Supreme Court, U. S.
FILED
DEC 20 1974
MICHAEL RODAK, JR., CLERK

IN THE

United States Supreme Court

OCTOBER TERM, 1974

NO. 74-768

CLARENCE BROWN,

Petitioner,

v.

GENERAL SERVICES ADMINISTRATION, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
BARRY L. GOLDSTEIN
ERIC SCHNAPPER
10 Columbus Circle
New York, New York 10019

JEFF GREENUP
200 West 135th Street
New York, New York 10030

Counsel for Petitioner

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutory Provisions Involved	2
Statement of the Case	4
Reasons for Granting the Writ	7
1. The Decision of the Court Below That Section 717 Repealed, *Pro Tanto*, the 1866 Civil Rights Act, the Mandamus Act, and the Administrative Procedure Act, Is in Conflict With the Decisions of This Court, the Decisions of 5 Circuits, and the Express Intent of Congress	7
2. The Decision of the Court Below, Establishing for Actions Under the 1866 Civil Rights Act, etc., Exhaustion Requirements Different Than Those Established by Congress for Actions Under Section 717, Seriously Undermines the Statutory Scheme of Title VII	13
Conclusion	19
Appendix—	
Opinion of the District Court	1a
Opinion of the United States Court of Appeals for the Second Circuit	2a

Cases: PAGE

Alexander v. Gardner-Denver Co., 39 L.Ed 2d 147 (1974) 7, 8, 10

Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971) 9, 10
Bowers v. Campbell, 8 EPD ¶ 9752 (9th Cir. 1974) 16
Brady v. Bristol-Meyers, Inc., 459 F.2d 621 (8th Cir. 1972) 9

City Bank Farmers' Trust Co. v. Schnader, 291 U.S. 24 (1934) 17
Crown Coat Front Co., Inc. v. United States, 386 U.S. 503 (1967) 19

Drew v. Liberty Mutual Insurance Company, 480 F.2d 69 (5th Cir. 1973) 10

Henderson v. Defense Contract Administration Services, 370 F. Supp. 180 (S.D.N.Y.) 5
Hickman v. Fincher, 483 F.2d 855 (4th Cir. 1973) 9
Howard v. Lockheed Georgia Co., 372 F. Supp. 854 (N.D. Ga. 1974) 15
Huston v. General Motors Corp., 477 F.2d 1003 (8th Cir. 1973) 6

Johnson v. Railway Express Agency, No. 73-1543 ..... 14, 18
Jones v. Mayer, 392 U.S. 409 (1968) 8

Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1970) ..9, 10
Loo v. Gerarge, 374 F. Supp. 1338 (D. Hawaii 1974) 15
Love v. Pullman Co., 404 U.S. 522 (1972) 12

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973) 9

PAGE

Morton v. Mancari, 41 L.Ed. 2d 290 (1974) 7, 8

Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970) 9, 12
Smith v. Illinois Bell Telephone Co., 270 U.S. 587 (1926) 17
Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) 8
Sunshine Publishing Co. v. Summerfield, 184 F. Supp. 767 (D.D.C. 1960) 17

Walker v. Southern R.R. Co., 385 U.S. 196 (1966) 18
Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970) 9

Young v. International Telephone & Telegraph, 438 F.2d 757 (3d Cir. 1971) 9, 12

Statutes:

5 U.S.C. § 702 ..... 6, 7

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1361 ..... 4, 6, 7

28 U.S.C. § 1346 ..... 4, 6, 7

42 U.S.C. § 1981 ..... 3, 6, 7, 9, 10, 12, 13, 14, 17

42 U.S.C. § 2000e-16 ..... 2, 3, 5, 6, 7, 13, 14, 15, 16, 18

Legislative History:

110 Cong. Rec. 13650 11

Hearings Before the Senate Committee on Labor and Public Welfare 91st Cong. 1st Sess., (1971) 11

PAGE

Hearings Before a Subcommittee of the Senate Committee on Labor & Public Welfare, 92nd Cong., 1st Sess. (1971) 18

Hearings Before a Subcommittee of the House Committee on Education & Labor, 91st Cong., 1st and 2nd Sess. (1969-70) 17

H.R. Rep. 92-238 (1971) 12, 13, 17

Legislative History of the Equal Employment Opportunity Act of 1972, pp. 1512-1514 12

Other Authorities:

5 C.F.R. § 713.220 15

Yale L.J. 574 (1963) 17

Board of Appeals and Review, Work Load Statistics 15

Brief of the United States as Amicus Curiae in No. 73-1543 .....13, 18

Memorandum of the Respondents in Opposition, No. 74-116 15

IN THE

United States Supreme Court

OCTOBER TERM, 1974

No. .....

CLARENCE BROWN,

Petitioner,

v.

GENERAL SERVICES ADMINISTRATION, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Clarence Brown, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in these proceedings on November 21, 1974.

Opinions Below

The opinion of the Court of Appeals, which is not yet reported, is set out in the Appendix hereto at pp. 2a-18a. The opinion of the District Court, which is not reported, is set out in the Appendix hereto at p. 1a.

Jurisdiction

The judgment of the Court of Appeals was entered on November 21, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Did section 717 of Title VII of the 1964 Civil Rights Act repeal, *pro tanto*, the 1866 Civil Rights Act, the Tucker Act, the Mandamus Act, and the Administrative Procedure Act?

2. Are the exhaustion requirements for a civil action to remedy employment discrimination, maintained under the 1866 Civil Rights Act, the Tucker Act, the Mandamus Act, and the Administrative Procedure Act, different and more stringent than those established by Congress for an action under section 717?

Statutory Provisions Involved

Section 717(a) of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000e-16(a), provides:

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds) in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress

> shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Section 717(c) of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000e-16(c), provides:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Section 1981, 42 U.S.C., provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws proceedings for the security of persons and property as is enjoyed by white citizens and shall

be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1361, 28 U.S.C., provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Section 1346, 28 U.S.C., provides in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> . . .
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Statement of the Case

Petitioner is a black employee of the General Services Administration. Petitioner, who is presently a GS-7, has not been promoted for 8 years.

On July 15, 1971, petitioner filed with the General Services Administration Equal Employment Office an administrative complaint alleging that he had been denied a promotion on the basis of race. The agency investigation revealed that petitioner had been repeatedly passed over for promotions in favor of white employees. The uncontested statistics revealed that a disproportionately low

number of black employees were promoted above the GS-7 level within the General Services Administration. On March 23, 1973, twenty months after petitioner filed his administrative complaint, the General Services Administration issued its final agency decision concluding that it had not discriminated on the basis of race.

Petitioner was notified of the agency decision on March 26, 1973. The letter of notification advised petitioner that he could commence a civil action in the United States District Court, or file an appeal to the Board of Appeals and Review of the Civil Service Commission. The letter also indicated that any action under section 717 of the 1964 Civil Rights Act, 42 U.S.C. §2000e-16, must be commenced within 30 days of receipt of the letter. At that time, and until May of 1974, it was the uniform position of the Department of Justice that section 717 did not apply to claims such as those of petitioner, which arose prior to the effective date of the statute, and that there were accordingly no rights to be lost by failing to sue within 30 days.[1]

On the basis of this letter petitioner decided to file suit. Because petitioner had great difficulty locating an attorney who would represent him, he did not succeed in filing his complaint until May 7, 1973, 12 days after the deadline for filing an action under section 717.[2] Since the

---

[1] On August 10, 1973, the government moved to dismiss this action in the District Court on the ground, *inter alia*, that petitioner had not commenced his action within the 30 days required under Section 717. On July 27 and September 24, 1973, the same United States Attorney filed memoranda in the same District Court, in *Henderson* v. *Defense Contract Administration Services*, 370 F. Supp. 180 (S.D.N.Y. 1973), arguing that section 717 did not apply to employees such as petitioner who were the victims of discrimination prior to March 24, 1972.

[2] Within a week of receiving the letter of March 23, petitioner presented himself and the letter to the clerk of the United States

deadline for filing an action under section 717 had by then passed, petitioner asserted federal jurisdiction under several other statutes, including the Mandamus Act, 28 U.S.C. § 1361, the Tucker Act, 28 U.S.C. § 1346, the 1866 Civil Rights Act, 42 U.S.C. § 1981, and the Administrative Procedure Act.

On September 27, 1973, the District Court for the Southern District of New York dismissed the action for lack of jurisdiction. On November 21, 1974, the Court of Appeals for the Second Circuit affirmed that dismissal. The Second Circuit concluded (1) that section 717 had, by implication, repealed *pro tanto* the Tucker Act, the Mandamus Act, the 1866 Civil Rights Act, the Administrative Procedure Act, and the other statutes which petitioner asserted created federal jurisdiction (2) that section 717 applied to discrimination occurring prior to its effective date, March 24, 1972, and that this implied repeal was accordingly retrospective and (3) that the exhaustion requirements for actions other than under section 717 were different and more stringent than the exhaustion requirements fixed by statute for an action under section 717, and that petitioner had failed to meet these special exhaustion requirements.

District Court for the Southern District of New York, where the *pro se* clerk advised him to retain a private attorney. Compare *Huston* v. *General Motors Corp.*, 477 F. 2d 1003 (8th Cir. 1973). Prior to obtaining the services of counsel, petitioner unsuccessfully sought assistance from three other attorneys, the New Jersey Civil Liberties Union, and the national office and a local chapter of the National Association for the Advancement of Colored People.

Reasons for Granting the Writ

1. The Decision of the Court Below That Section 717 Repealed, *Pro Tanto*, the 1866 Civil Rights Act, the Tucker Act, the Mandamus Act, and the Administrative Procedure Act, Is in Conflict With the Decisions of This Court, the Decisions of 5 Circuits, and the Express Intent of Congress

In the court below petitioner alleged that the District Court had jurisdiction over his claim under several statutes which create a variety of overlapping remedies. These statutes included the 1866 Civil Rights Act, 42 U.S.C. § 1981, the Mandamus Act, 28 U.S.C. § 1361, the Tucker Act, 28 U.S.C. § 1346, and the Administrative Procedure Act, 5 U.S.C. § 702. The Court of Appeals did not decide whether any of these statutes gave the District Court jurisdiction to remedy discrimination in federal employment. The Second Circuit concluded, instead, that even if these statutes had at one time authorized such remedies, they had all been repealed *pro tanto* by implication when Congress enacted section 717 as part of Title VII of the 1964 Civil Rights Act. Pp. 13a-15a. The court noted that actions under section 717 had to be filed within 30 days, and reasoned that it would "frustrate Congressional intent" to permit suits under statutes which contained no such limitation. P. 15a.

The decision of the Second Circuit is in clear conflict with the decisions of this Court in *Morton* v. *Mancari*, 41 L.Ed. 2d 290 (1974) and *Alexander* v. *Gardner-Denver Co.*, 39 L.Ed. 2d 147 (1974). In *Morton* the appellant argued that section 717 had tacitly repealed earlier enacted statutory preferences in favor of Indian applicants for jobs at the Bureau of Indian Affairs. This Court unanimously rejected that contention:

> Appellees encounter head-on the "cardinal rule . . . that repeals by implication are not favored." . . . They

> and the District Court read the congressional silence as effectuating a repeal by implication. There is nothing in the legislative history, however, that indicates affirmatively any congressional intent to repeal the 1934 preference. . . . The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective.

41 L.Ed. 2d at 300-301. In *Alexander* the employer urged that an aggrieved employee could only invoke a single remedy in seeking to remedy racial discrimination. In ruling to the contrary this Court, expressly referring to the 1866 Civil Rights Act, explained,

> [L]egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. . . . Moreover, the legislative history of Title VII manifests a Congressional intent to allow an individual to pursue his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed *to supplement, rather than supplant,* existing laws and institutions relating to employment discrimination.

39 L.Ed. 2d at 158. (Emphasis added). The Second Circuit, however, reasoned that Title VII was designed to supplant pre-existing remedies, and thus repealed them by implication. That holding is clearly inconsistent with this Court's decisions in *Morton* and *Alexander*. See also *Jones* v. *Mayer Co.*, 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969).

The decision below is also in conflict with the decisions of five courts of appeals. Private employers have repeatedly advanced the same argument urged by the government in this case— that 42 U.S.C. § 1981 and other pre-existing statutes were repealed or "pre-empted" by Title VII. That contention has been uniformly rejected outside of the Second Circuit. *Long* v. *Ford Motor Co.*, 496 F.2d 500, 503-04 (6th Cir. 1970); *Brady* v. *Bristol-Meyers, Inc.*, 459 F.2d 621, 623 (8th Cir. 1972); *Young* v. *International Telephone & Telegraph*, 438 F.2d 757, 760-764 (3d Cir. 1971); *Boudreaux* v. *Baton Rouge Marine*, 437 F.2d 1011, 1016-17 (5th Cir. 1971); *Waters* v. *Wisconsin Steel Works*, 427 F.2d 476, 484-85 (7th Cir. 1970). See also *Macklin* v. *Spector Freight Systems, Inc.*, 478 F. 2d 979, 993-996 (D.C. Cir. 1973); *Hickman* v. *Fincher*, 483 F. 2d 855, 857 (4th Cir. 1973). In each of these actions the private employer argued, as did the Second Circuit, that allowing suits under other statutes would allow employees to sue without meeting the procedural pre-requisites for an action under Title VII. In *Sanders* v. *Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), the employee sued 46 days after receiving a right to sue letter from the E.E.O.C., and thus failed to meet the Title VII 30 day statute of limitations. The Fifth Circuit rejected the argument that Title VII precluded suits under section 1981.

> Since there is no language in Title VII that can remotely be construed as directly repealing § 1981, the only means of repeal through pre-emption would be by implication. Repeals by implication, however, are not favored . . . . Thus we conclude that the specific remedies fashioned by Congress in Title VII were not intended to pre-empt the general remedial language of § 1981. . . . The wide differences provided by the statute of limitations applicable to actions under the two acts are not irreconcilable . . . .

431 F.2d at 1100-1101.

In *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971), the employer claimed the plaintiff had not complained to E.E.O.C. within 90 days of the alleged discrimination as required for a Title VII action, and that allowing an action on any other basis would vitiate that requirement. The Court of Appeals concluded:

> [E]ven if appellant is unable to demonstrate his aggrieved status within the 90-day period for the purposes of this case it is clear that he has stated a claim for relief under 42 U.S.C. § 1983. . . . [T]he contention that the enactment of Title VII of the Civil Rights Act of 1964 pre-empted or repealed by implication whatever remedy for employment discrimination that previously existed under § 1981 . . . has [been] explicitly rejected . . . .

437 F.2d at 1016. In *Long* v. *Ford Motor Company*, 406 F.2d 500 (6th Cir. 1974) the plaintiff had not filed any complaint with E.E.O.C., a clear jurisdictional pre-requisite for a Title VII. The Sixth Circuit nonetheless upheld jurisdiction under section 1981, relying on this Court's decision in *Alexander* v. *Gardner-Denver Co., supra,* as compelling the conclusion that Title VII had not pre-empted section 1981. In *Drew* v. *Liberty Mutual Insurance Company,* 480 F.2d 69 (5th Cir. 1973), plaintiff sued for injunctive relief while her complaint to E.E.O.C. was still pending. Only the Commission was authorized to bring an action under Title VII to protect an employee during the pendency of such administrative proceedings. The Fifth Circuit upheld plaintiffs right to bring such an action under section 1981, rejecting the contention that that right had been pre-empted by Title VII. 480 F.2d at 74-76.

The decision below is also contrary to the clear intent of Congress. Congress has repeatedly rejected proposals

to make Title VII the exclusive remedy for claims of racial discrimination in employment. In 1964 Senator Tower proposed an amendment to the pending Civil Rights Act to make Title VII the exclusive remedy for discrimination in employment. The amendment was defeated on the floor of the Senate. 110 Cong. Rec. 13650-52. In 1972 Senator Hruska proposed an amendment which would have made Title VII the exclusive remedy for claims of employment discrimination. The amendment was opposed by the Department of Justice; the chief of the Civil Rights Division testified,

> [W]e are concerned that at this point in time there be no elimination of any of the remedies which have achieved some success in the effort to end employment discrimination. In the field of civil rights, the Congress has regularly insured that there be a variety of enforcement devices to insure that all available resources are brought to bear on problems of discrimination. . . . [I]t would, in our judgment, be unwise to diminish in any way the variety of enforcement means available to deal wih discrimination in employment.[3]

In opposing the Hruska Amendment, Senator Javits argued:

> There are other remedies, but those other remedies are not surplusage. Those other remedies are needed to implement the promise we make under the Constitution to prevent discrimination in employment. The laws of 1866, 1871, as well as the law of 1964 are to implement that promise . . . . Mr. President, the key to the proposition which we laid before the Sen-

[3] Hearings Before the Senate Committee on Labor and Public Welfare, 91st Cong. 1st Sess., 162-163 (1971).

> ate—incidentally, this has now been the law for the last 8 years—is that what this amendment would seek to do is cancel away much of that law. It seems to me that should not be the attitude of the Senate, in face of the fact, as I say, that employees are not fully protected by the exclusive remedy which is sought to be compelled by this amendment.[4]

A similar proposal was rejected by the House Labor Committee, which expressly approved the decisions in *Young* v. *International Telephone & Telegraph Co.*, 438 F.2d 757 (3d Cir. 1971) and *Sanders* v. *Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), and expressed its belief that the remedies afforded by Title VII and section 1981 "augment each other and are not mutually exclusive".[5] If the Department of Justice now believes that Congress erred in rejecting the Tower and Hruska amendments, its remedy is to seek an amendment to Title VII from the Congress, not from the courts.

The importance of preserving non-Title VII remedies for federal employees is well illustrated by the history of litigation under Title VII. Because of the stringent jurisdictional requirements for a Title VII action, aggrieved minority employees—frequently under-educated and without the assistance of counsel—have often failed to meet the statutory prerequisites, and have resorted instead to suits under other federal statutes. See pp. 9-10, *supra;* compare *Love* v. *Pullman Co.*, 404 U.S. 522, 525-526 (1972). Even where an employee succeeds in bringing a Title VII action, he may also wish to assert jurisdiction under other statutes which may provide different and more ample

[4] Legislative History of the Equal Employment Opportunity Act of 1972, pp. 1512-1514.

[5] H.R. Rep. 92-238, U.S. Code Congressional and Administrative News, 92nd Cong., 1st Sess., 78-79 (1971).

remedies. See pp. 15-16, *infra.* The Solicitor General has correctly characterized these additional remedies available under statutes such as section 1981 as "of substantial importance."[6] Earlier this term the government urged this Court to reaffirm the existence and preserve the vitality of an employee's non-Title VII rights against a private employer.[7] An employee should not enjoy a lesser remedy because he works for the United States. Congress enacted section 717, not to restrict the remedies available to such workers, but "to accord Federal Employees the same rights and impartial treatment which the law seeks to afford employees in the private sector." H.R. Rep. 92-238, p. 23 (1971).[8] A grant of certiorari is necessary in the instant case to enforce that congressional policy.

2. The Decision of the Court Below, Establishing for Actions Under the 1866 Civil Rights Act, etc., Exhaustion Requirements Different Than Those Established by Congress for Actions Under Section 717, Seriously Undermines the Statutory Scheme of Title VII

Petitioner filed his administrative complaint on July 15, 1971. After a delay of 617 days, the final agency decision was rendered on March 23, 1973. These administrative proceedings constituted sufficient exhaustion for purposes of a civil action under section 717, which authorizes such suits after final agency action or the passage of 180 days, which-

[6] Brief for the United States as Amicus Curiae, in *Johnson* v. *Railway Express Agency*, No. 73-1543, pp. 13-14.

[7] "Although Title VII was designed as a comprehensive solution to the problem of invidious employment discrimination, Congress intended individuals aggrieved by such discrimination to have available parallel or overlapping remedies; such individuals are not limited to seeking relief only under Title VII." *Id.*, p. 13.

[8] Section 717(d) provides that the procedures in civil actions against the federal agencies shall be the same as in cases against private employers. See 42 U.S.C. § 2000e-16(d).

ever occurs sooner. In order to sue under section 717, petitioner was not required to pursue an appeal to the Board of Appeals and Review of the Civil Service Commission. The court below, however, held that there was a different and more stringent exhaustion requirement for actions under the 1866 Civil Rights Act and other statutes enacted prior to 1972, and concluded that prior to commencing an action under these statutes petitioner was obligated to appeal to the Board of Appeals and Review.

The decision of the Second Circuit thus establishes two exhaustion standards for a federal employee aggrieved by discrimination. The exhaustion requirement for a section 717 action is the passage of 180 days since the commencement of administrative proceedings or the completion of agency action, whichever occurs first. See 42 U.S.C. § 2000e-16(c). The exhaustion requirement for an action under section 1981 or other statutes enacted before 1972 is the processing of a grievance all the way through the Board of Appeals and Review. See pp. 16a-18a. An aggrieved employee who has obtained final agency action or has waited 180 days thus faces a Hobson's choice—he can sue at once under section 717, but in so doing he loses all his rights under pre-1972 statutes, or he can preserve those rights but only by enduring administrative delays substantially longer than contemplated by Congress.

This rule poses the same type of problem as is raised by *Johnson* v. *Railway Express Agency*, No. 73-1543, argued December 11, 1974. The express exhaustion requirements of section 717 reflect an important congressional policy that aggrieved federal employees not be required to pursue administrative remedies that Congress regarded as either futile or unreasonably time consuming. That policy was adopted by the ninety-second Congress in the light of substantial evidence that open-ended exhaustion re-

quirements had led to endless and pointless delays. See p. 17, *infra*. The basis for that policy is well illustrated by the facts of this case. Both the regulations of the Civil Service Commission, 5 C.F.R. § 713.220, and section 717 by implication, required that petitioner's administrative complaint be completely processed by his agency within 180 days. In fact the agency took more than three times that long to reach a final decision. Similarly the record of the Board of Appeals and Review, in considering appeals of aggrieved employees, reveals the futility of pursuing such appeals. In the last three fiscal years the Board has reversed an agency decisions and entered findings of discrimination in only 37 of 1876 appeals, less than 2%.[9] A significant number of these reversals came in appeals by white employees who claimed they had been discriminated against by agency affirmative action programs.

There are, on the other hand, a number of legitimate reasons why an aggrieved employee would want to retain his rights under section 1981 and other pre-1972 enactments. The statute of limitations may be longer under section 1981 than under section 717.[10] Although compensatory and punitive damages may not be available under Title VII,[11] the pre-1972 statutes are not so limited. The government has generally maintained, except in this case, that section 717 does not apply to discrimination occurring before March 24, 1972. See p. 5, *supra*. An employee such as petitioner, aggrieved by an act of discrimination commencing before that date, may only have an

---

[9] Board of Appeals and Review, Work Load Statistics, fiscal years 1972, 1973, 1974.

[10] Compare Memorandum of the Respondents in Opposition, No. 74-116, pp. 3-4.

[11] See e.g. *Loo* v. *Gerarge*, 374 F.Supp. 1338 (D. Hawaii 1974); *Howard* v. *Lockheed Georgia Co.*, 372 F.Supp. 854 (N.D. Ga. 1974).

adequate remedy under statutes other than section 717. Section 717(c) appears to authorize relief only against the agency itself; under section 1981 an employee might also be able to obtain relief against discriminating individuals in an appropriate case. The scope of judicial review may be broader if an action is brought under section 1981. See *Bowers* v. *Campbell*, 8 EPD ¶ 9752 (9th Cir. 1974). And, as is detailed *supra*, pp. 10-12, Congress in enacting section 717 intended to leave intact all such pre-existing statutory rights and remedies.

This problem is aggravated by the practices of the Civil Service Commission. At the completion of final agency action, as in this case, each agency, pursuant to forms suggested by the Commission, sends the employee a letter notifying him that he may now commence a private action in federal court or, if he prefers, appeal to the Board of Appeals and Review. Nothing in the letter states or implies that the employee will lose any rights whatever by declining to pursue that appeal.[12] Thousands of these letters have been sent out to employees who, like petitioner, relied on them and declined to pursue such an appeal.[13]

[12] The letter sent to petitioner on March 23, 1973, read in part:

"If this decision does not meet with your satisfaction, you may file an appeal, in writing, either in person or by mail, with the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D.C. 20415. The Board's decision is the final administrative appeal. This appeal must be filed within 15 days of receipt of this letter.

"If you choose to appeal to the Board of Appeals and Review, you retain the right to file a civil action in Federal district court within 30 calendar days after receipt of the Board's final decision on your appeal. You also have the right to file a civil action in Federal district court within 30 calendar days of receipt of this letter or 180 days after filing an appeal with the Board of Appeals and Review if no decision has been made."

[13] The argument that petitioner had not adequately exhausted his administrative remedies was not raised by the government in the District Court or in its brief in the Court of Appeals, but first arose in a suggestion by the government at oral argument. There was, as a result, nothing in the record before the Court of Appeals as to why petitioner had not pursued such an appeal. That decision was in fact made because such an appeal appeared futile, because of the long delays already endured, and because petitioner believed in light of the letter he received from the General Services Administration that failure to appeal would not entail any loss of rights.

The congressional judgment as to what constitutes excessive exhaustion requirements must be heeded by the courts in fashioning exhaustion rules under statutes such as 42 U.S.C. § 1981. This Court has long recognized that a complainant need not further pursue administrative remedies where previous exhaustion efforts have taken so long as to make further delay unreasonable, *Smith* v. *Illinois Bell Telephone Co.*, 270 U.S. 587 (1926),[14] or where there is no reasonable chance that the result of further administrative proceedings will be favorable to the grievant. *City Bank Farmers' Trust Co.* v. *Schnader*, 291 U.S. 24 (1934). In the case of federal employees aggrieved by discrimination on the basis of race, Congress has concluded that it would be unfair to require such employees to file an appeal with the Board of Appeals and Review in the Service Commission because "the record shows that the Board rarely reverses the agency decision." H. Rep. 92-238, p. 24. Similarly Congress has concluded that, because of the nature of these claims and the history of excessive delays in their processing, it would be unconscionable to require such employees who want to resort to the courts to spend more than 180 days exhausting their administrative remedies.[15] It would be inappropriate for the

[14] See also *Sunshine Publishing Co.* v. *Summerfield*, 184 F.Supp. 767 (D.D.C. 1960) (One and one half year delay); Note, 72 Yale L.J. 574 (1963).

[15] See Hearings Before a Subcommittee of the House Committee on Education & Labor, 91st Cong., 1st and 2nd Sess. 111-112, 118,

courts, in delineating exhaustion requirements for section 1981 and other statutes without express exhaustion standards, to require aggrieved employees to pursue appeals to the Board of Appeals and Review, a step which Congress concluded was futile, or to consume more than 180 days in administrative proceedings, a delay which Congress concluded was unfair. Compare *Walker* v. *Southern R.R. Co.*, 385 U.S. 196 (1966).

The decision below places in irreconcilable conflict two clear congressional policies—the policy in favor of permitting resort to the courts without unreasonably lengthy or futile exhaustion, and the policy of creating overlapping and complementary civil remedies. An employee who has waited 180 days or obtained final agency action must choose between prompt judicial action or retaining his non-Title VII remedies—in the Second Circuit, at least, he cannot have both. Here, as in *Johnson* v. *Railway Express Agency*, "[t]here is no basis in either Section 1981 or Title VII, or their respective legislative histories, for imposing such a Hobson's choice."[16] The choice is particularly difficult because an employee has only 30 days after final agency action to file a section 717 action and only 15 days to request an appeal to the Board of Appeals & Review. The court below requires an employee to gamble away his non-Title VII rights by not appealing by the 15th day in the hope that he will be able to find a lawyer and file suit by the 30th. If, like petitioner, he does not succeed in filing his Section 717 on time it is already too late to appeal and his non-Title VII rights are also lost. Such "a procedural trap for the unwary"

147-149, 157, 176-180, 238-240 (1969-70); Hearings Before a Subcommittee of the Senate Committee on Labor & Public Welfare, 92nd Cong., 1st Sess., 206, 212, 276 (1971).

[16] Brief of United States as Amicus Curiae, in No. 73-1543, p. 17.

should not be allowed to obstruct the enforcement of basic rights. *Crown Coat Front Co., Inc.* v. *United States*, 386 U.S. 503, 515 (1967).

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
BARRY L. GOLDSTEIN
ERIC SCHNAPPER
10 Columbus Circle
New York, New York 10019

JEFF GREENUP
200 West 135th Street
New York, New York 10030

Counsel for Petitioner

APPENDIX

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 2026-LFM

CLARENCE BROWN,

Plaintiff,

—against—

GENERAL SERVICES ADMINISTRATION, *et al.*,

Defendants.

MACMAHON, *District Judge.*

This action is brought purportedly against a government agency and several of its officers and is, therefore, one against the United States itself. *Gnotta* v. *United States,* 415 F.2d 1271 (8th Cir. 1969), *cert. denied,* 397 U.S. 934 (1970). The government, however, has not consented to such a suit and the action is therefore barred by sovereign immunity. *Dalehite* v. *United States,* 346 U.S. 15 (1953). Moreover, there is nothing in either the Civil Rights Act of 1964, 28 U.S.C. §§ 1331, 1343, or the Equal Opportunity Act of 1972, 42 U.S.C. § 2000e et seq., which waives immunity or confers subject matter jurisdiction.

Accordingly, this court lacks subject matter jurisdiction over this action, and defendant's motion to dismiss the complaint, pursuant to Rule 12(b), Fed.R.Civ.P., is granted.

So ordered.

Dated: New York, N. Y.
September 26, 1973

LLOYD F. MACMAHON
Lloyd F. MacMahon
United States District Judge

Opinion of United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 935—September Term, 1973.

(Argued June 14, 1974 Decided November 21, 1974.)

Docket No. 73-2628

CLARENCE BROWN,

Plaintiff-Appellant,

v.

GENERAL SERVICES ADMINISTRATION, UNITED STATES OF AMERICA, TRANSPORTATION AND COMMUNICATIONS SERVICE, COMMUNICATIONS DIVISION, REGION 2, JOSEPH A. DALY, Regional Director, Transportation and Communications Service, ALBERT GALLO, Chief, Communications Division and FRANK A. LAPOLLA, Acting Chief, Communications Division, Transportation and Communications Service, Region 2,

Defendants-Appellees.

Before:

LUMBARD, HAYS and TIMBERS,

Circuit Judges.

Appeal from judgment entered in the Southern District of New York, Lloyd F. MacMahon, *District Judge,* dismissing a complaint which alleged racially discriminatory em-

ployment practices on the part of an agency and officials of the federal government.

Affirmed.

ERIC SCHNAPPER, New York, N.Y. (Jeff Greenup, Jack Greenberg, James M. Nabrit, III, Johnny J. Butler, Joseph P. Hudson and Greenup & Miller, New York, N.Y., on the brief), *for Plaintiff-Appellant.*

CHARLES FRANKLIN RICHTER, Asst. U.S. Atty., New York, N.Y. (Paul J. Curran, U.S. Atty., and Gerald A. Rosenberg, Asst. U.S. Atty., New York, N.Y., on the brief), *for Defendants-Appellees.*

TIMBERS, *Circuit Judge:*

This appeal from a judgment entered September 28, 1973 in the Southern District of New York, Lloyd F. MacMahon, *District Judge,* dismissing the complaint in an action brought against an agency and officials of the federal government to redress alleged racially discriminatory employment practices presents the questions (1) whether Section 717(c) of the Equal Employment Opportunity Act of 1972[1] applies retroactively to claims arising before its

1 Section 717(c) of the Equal Employment Opportunity Act of 1972 as codified in 42 U.S.C. §2000e-16(c) (Supp. II 1972), provides in pertinent part:

"Within thirty days of receipt of notice of final action taken by [an] . . . agency, or by the Civil Service Commission upon an appeal from a decision or order of such . . . agency . . . on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred

enactment; (2) whether the statute pre-empts any other federal jurisdictional basis for appellant's claim; and (3) whether in any event appellant has failed to exhaust administrative remedies. We hold that each of these questions must be answered in the affirmative. We affirm.

I. Facts

Appellant Clarence Brown, a black, has been employed by the General Services Administration (GSA) Regional Office No. 2 (New York City) since 1957. He has not been promoted since 1966. His current job classification is Communications Specialist, GS-7, Telecommunications Division, Automated Data Telecommunications Service.

In December 1970, Brown was referred for promotion to GS-9 by his supervisors along with two white employees, Ownbey and Trost. All three were rated "highly qualified". Trost was the only one promoted. Brown filed an administrative complaint of racial discrimination with the GSA Equal Employment Opportunity Office. The complaint was withdrawn, however, after Brown was told that further promotions would soon be available and that he had been denied promotion because of lack of the requisite "voice experience".

Brown claims that he thereafter acquired full "voice experience". In June 1971, another GS-9 promotional opportunity opened. Brown and Ownbey again were rated "highly qualified" for the opening. A third white employee also was available. Ownbey was chosen.

---

and eighty days from the filing of the initial charge with the . . . agency . . . or with the Civil Service Commission on appeal from a decision or order of such . . . agency . . . until such time as final action may be taken by [an] . . . agency, . . . an employee . . . if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the . . . agency, . . . shall be the defendant."

On July 15, 1971, Brown filed a second administrative complaint with the GSA Equal Employment Opportunity Office, claiming racial discrimination in the denial of his promotion. An investigative report was prepared. After review, the GSA Regional Administrator determined that there was no evidence of racial discrimination and so informed Brown by letter dated October 19, 1972. This letter also informed Brown that he could request a hearing on his complaint within seven days; but that if he did not make such a request, the determination would become the final agency decision and he would then have the right to appeal the GSA's decision to the Board of Appeals and Review of the Civil Service Commission (CSC), or to file a civil action in the federal district court within 30 days.

Brown requested a hearing. It was held on December 13, 1972 before a complaints examiner of the CSC. Brown was represented by counsel. On February 9, 1973, the complaints examiner issued his findings and recommended decision. He found no evidence of discrimination and recommended that no action be taken on the basis of the complaint.

By letter dated March 23, 1973, received by Brown on March 26, the GSA Director of Civil Rights rendered the final agency decision that the evidence did not support the complaint of racial discrimination. The letter, pursuant to regulations, included a copy of the transcript of the hearing and of the findings and recommended decision of the complaints examiner. The letter also advised Brown of his options: (1) to file an appeal with the Board of Appeals and Review of the CSC within 15 days after receipt of the letter, in which case he could commence a civil action in the federal district court within 30 days after receipt of the Board's decision or 180 days after filing the appeal if no decision had been rendered; or (2) to commence a

civil action in the federal district court within 30 days after receipt of the letter.[2]

Brown did not file an appeal with the Board. Instead, he commenced the instant action in the district court on May 7, 1973—more than 30 days after receipt of the letter. His complaint named as defendants the GSA and Brown's superiors, Joseph A. Daly, Albert Gallo and Frank A. Lapolla.

Basically, Brown's complaint alleges that he has been denied promotions because of his race.[3] Apparently he seeks a promotion to Communications Assistant, GS-9, a supervisory position, and appropriate back pay, although some reference is made in his brief to damages based on discrimination.

The original complaint alleged jurisdiction under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq. (1970); Section 717 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-16 (Supp. II 1972); 28 U.S.C. §1331 (1970); and the Declaratory Judgment Act, 28 U.S.C. §§2201-02 (1970). The complaint also sought to invoke jurisdiction to secure protection of and redress deprivation of rights secured by 42 U.S.C. §§2000e et seq. (1970) and 42 U.S.C. §1981 (1970). The complaint demanded "such relief as may be appropriate, including injunctive orders, damages, costs, attorney's fees and back pay."[4]

---

2 The provisions for civil actions are set forth in Section 717(c) of the Equal Employment Opportunity Act, 42 U.S.C. §2000e-16(c) (Supp. II 1972). See note 1 *supra*.

3 The position of the GSA is that Brown is a somewhat uncooperative employee and therefore has not been promoted. The substantive dispute, however, is not before us on this appeal. Our decision is limited to the threshold jurisdictional questions presented.

4 Relief available under Title VII and the regulations promulgated thereunder would include retroactive promotion with back pay and attorney's fees. 42 U.S.C. §§2000e-16(d), 2000e-5(g) (Supp. II 1972); 42 U.S.C. §2000e-5(k) (1970); 5 C.F.R. §713.271(b) (1974).

On July 23, 1973, defendants moved to dismiss the complaint on the ground that the court lacked subject matter jurisdiction since Brown had not filed his complaint within 30 days as required by Section 717(c) of the Equal Employment Opportunity Act of 1972 and his action therefore was barred by sovereign immunity.

On September 18, 1973, Brown moved for leave to file an amended complaint. The proposed amended complaint sought to add the CSC and Selbmann, the complaints examiner, as defendants, the original complaint having stated that the CSC had been joined as a party defendant although it was not actually named. The amended complaint also alleged as additional bases of jurisdiction 28 U.S.C. §1343 (4) (1970) and the Tucker Act, 28 U.S.C. §1346(a) and (b) (1970), and added an allegation that more than $10,000 was in controversy.[5]

In a memorandum opinion filed September 27, 1973, Judge MacMahon held that Brown's action was barred by sovereign immunity and that the district court therefore lacked subject matter jurisdiction. The judge also denied the motion for leave to amend on the ground that the original complaint had been dismissed and the proposed amended complaint did not change the situation.

The essential questions thus presented are whether Section 717(c) of the Equal Employment Opportunity Act of 1972 is to be applied retroactively to claims arising before but pending administratively at the time of its enactment; if so, whether that Act pre-empts any other avenue of judicial review; and whether in any event appellant has failed to exhaust administrative remedies.

---

5 Although the original complaint had alleged jurisdiction under 28 U.S.C. §1331 (1970), no jurisdictional amount was alleged.

II. Legislative History and Statutory Provisions

We believe that a key to the resolution of these questions may be found in the legislative history and the statutory provisions that emerged.

Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on race, color, religion, sex or national origin. 42 U.S.C. §§2000e-2 to -3 (1970), as amended (Supp. II 1972). As originally enacted in 1964, however, it did not apply to federal employees. 42 U.S.C. §2000e(b) (1970). Executive Orders[6] and agency regulations covered their complaints of employment discrimination.[7] In general, the agency itself conducted an investigation and hearing on such complaints. Although the hearing examiner might come from an outside agency, especially the CSC, the head of the employee's agency made the final agency determination. Appeal lay only to the Board of Appeals and Review of the CSC.[8]

No private right of action was provided for federal employees by Title VII until 1972 when Congress amended the Equal Employment Opportunity Act by adding Section 717(c). The legislative history of this section generally evinces a concern that job discrimination had not been eliminated in the federal government. It indicates the dissatisfaction of federal employees with the complaint procedures available. The committee reports show that Congress was not persuaded by testimony of agency officials that legislation was not needed because a private right

6 See Exec. Order No. 11478, as amended, Exec. Order 11590, 3 C.F.R. 207 (1974), 42 U.S.C. §2000e, at 10,297 (1970); Exec. Order 11246, as amended, Exec. Order 11375, 3 C.F.R. 169 (1974), 42 U.S.C. §2000e, at 10,294-97 (1970).

7 See 5 C.F.R. Pt. 713 (1971).

8 *Id.*; S. Rep. No. 92-415, 92d Cong., 1st Sess. 14 (1971), reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, at 410, 423 (1972) (hereinafter cited as Legislative History).

of action already existed. They note that, even if such right was available, the federal employee faced defenses of sovereign immunity and failure to exhaust administrative remedies; and, even if such defenses were overcome, the relief available, such as back pay or immediate advancement, was in doubt.[9]

It was against this backdrop that Congress in 1972 provided a private right of action for federal employees who were not satisfied with the agency or CSC decisions. Under Section 717(c), an aggrieved employee may commence an action in a federal district court within 30 days after a final order by his agency on a complaint of discrimination based on race, color, religion, sex or national origin, *or* within 30 days after a final order of the CSC on an appeal from such an agency decision, *or* after the elapse of 180 days from the filing of the initial complaint with the agency or of the appeal with the CSC if no decision has been rendered. No appeal need be taken to the CSC. The employee may go directly to court after the agency decision. 42 U.S.C. §2000e-16(c) (Supp. II 1972), note 1 *supra*.

III. Retroactivity

Brown's administrative complaint was filed with the GSA in 1971. It was under agency consideration at the time of the enactment of Section 717(c) on March 24, 1972. The question of retroactivity thus presented is whether the section should be applied to claims of discrimination which arose before its effective date but were awaiting final administrative decision at that time.[10] Retroactivity in this

9 H. R. Rep. No. 92-238, 92d Cong., 1st Sess. 23-26 (1971), in Legislative History 61, 82-86; S. Rep. No. 92-415, 92d Cong., 1st Sess. 14-17 (1971), in Legislative History 410, 421-26.

10 Cf. *Petterway* v. *Veterans Administration Hospital*, 496 F.2d 223 (5 Cir. 1974) (Section 717(c) held not applicable to pre-Act claim of federal employment discrimination because complaint was no longer

context refers only to the claim; the district court complaint in the instant action was filed on May 7, 1973—well after the date of enactment.

All parties to this appeal have sidestepped the retroactivity issue. Appellees deal with the issue briefly in a footnote by stating that they assume retroactive operation in their arguments here although they have argued otherwise elsewhere. Appellant argues that the section is not applicable to the instant action precisely because he did not file his complaint within the required 30 days and that other statutes provide a jurisdictional basis for his action.

The issue of retroactive application of this statute has resulted in a conflict between the circuits. The District of Columbia and Fourth Circuits have held that Section 717(c) applies retroactively to claims pending at the time of its enactment. *Womack* v. *Lynn,* —— F.2d —— (D.C. Cir. 1974) (No. 72-1827, filed October 1, 1974); *Koger* v. *Ball,* 497 F.2d 702 (4 Cir. 1974). The Sixth Circuit has held that it does not. *Place* v. *Weinberger,* 497 F.2d 412 (6 Cir. 1974). The district courts have gone both ways. Compare, e.g., *Ficklin* v. *Sabatini,* 378 F.Supp. 19 (E.D. Pa. 1974) (retroactive); *Henderson* v. *Defense Contract Administration Services,* 370 F.Supp. 180 (S.D.N.Y. 1973) (retroactive); *Walker* v. *Kleindienst,* 357 F.Supp. 749 (D.D.C. 1973) (retroactive) with *Moseley* v. *United States,* No. 72-380-S (S.D. Cal., filed January 23, 1973) (non-retroactive); *Hill-Vincent* v. *Richardson,* 359 F.Supp. 308 (N.D. Ill. 1973) (non-retroactive).

The conflict as to retroactivity has turned on whether Section 717(c) is to be viewed as providing a new substantive right for federal employees or whether it merely provides a new remedy for enforcing an existing right.

---

pending in agency at time of enactment and because complaint was filed beyond 30 day period).

The pre-1972 right of a federal employee not to be discriminated against is said to be found in Congressional enactments, 5 U.S.C. §7151 (1970), and Executive Orders. Exec. Orders 11246, 11478, note 6 *supra.* Courts which have adopted the view that Section 717(c) provides a new remedy for enforcing an existing right have held the section retroactive on the grounds that it is remedial, *Henderson* v. *Defense Contract Administration Services, supra,* or that it is procedural. *Koger* v. *Ball, supra.*

Courts which have refused to give retroactive effect to the statute, aside from rejecting the view that Section 717(c) merely creates a new remedy for a pre-existing right, have held that Congress intended only certain portions of the Equal Employment Opportunity Act to be retroactive for the reason that in Section 14 of the Act, in 42 U.S.C. §2000e-5, at 1,257 (Supp. II 1972), there is a specific provision that amendments to one section of Title VII are to be given retroactive effect, and since there is no reference in Section 14 to Section 717(c), the latter should not be given retroactive effect. See, e.g., *Place* v. *Weinberger, supra.*

This latter view strikes us as being inconsistent with the underlying principle of *Bradley* v. *School Board of City of Richmond,* —— U.S. —— (1974), 42 U.S.L.W. 4703 (U.S. May 15, 1974). There the Supreme Court held that a statute[11] authorizing a federal court to award attorney's fees in school desegregation cases should have been applied by the Court of Appeals so as to result in the affirmance of the decision of the District Court which had awarded such fees on the basis of its general equity power, since the statute was enacted after the District Court's award but before

---

11 Section 718 of the Emergency School Aid Act, Title VII of the Education Amendments of 1972, 20 U.S.C. §1617 (Supp. III 1973).

the Court of Appeals' decision. The rationale of the Supreme Court's decision was stated as follows:

> "We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." —— U.S. at ——, 42 U.S.L.W. at 4707.

We believe that this principle applies here. Neither the statute itself nor the legislative history gives any direction as to whether Section 717(c) should be applied to complaints pending within the agency at the time of its enactment. In light of *Bradley*, we cannot agree with the Sixth Circuit's holding in *Place* v. *Weinberger, supra*, that Congress by its silence as to all sections of the Act except one intended the other sections to have prospective application only. As the Supreme Court stated in *Bradley:*

> "[E]ven where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect.
>
> Accordingly, we must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature. . . ." —— U.S. at ——, 42 U.S.L.W. at 4708.

While *Bradley* dealt with a court of appeals' review of a district court's decision, we believe that the underlying principle is applicable to a review by a district court of an agency decision. So far as the statutory language and the relevant legislative history are concerned, retroactive application of Section 717(c) would appear to be appropriate.

This does not end our analysis under *Bradley*. We must determine whether application of a change in law to pending claims "would result in manifest injustice". —— U.S. at ——, 42 U.S.L.W. at 4707. In each of the cases where Section 717(c) has been applied retroactively, it was done to *aid* a plaintiff in the prosecution of his complaint. See, e.g., *Koger* v. *Ball, supra*. In view of the policy of the federal government against discrimination in federal employment and its encouragement of efforts to eliminate such discrimination in the private and state and local government sectors, such retroactive application of the statute appears sound. If Section 717(c) is held applicable here, however, Brown's claim must fall since he admittedly has failed to comply with its 30 day filing requirement.

We hold that there is no "manifest injustice" in the retroactive application of the statute to Brown's complaint. Twice he was notified in letters from the GSA of the procedure for obtaining court review of the agency decision. Both letters gave notice of the 30 day filing requirement. His counsel have not suggested any excuse for the delay in filing the complaint—either in their briefs, or in oral argument, particularly in response to a direct question by the Court concerning such delay. Instead, his counsel argue that the statute does not apply because Brown has not complied with it.[12] In a sense, he is correct in that he cannot take advantage of the statute because he has not complied with its terms. This failure is fatal to Brown's claim, since we hold below that Congress intended Section 717(c) to be the exclusive judicial remedy for federal employee discrimination grievances.

IV. Pre-emption

Appellees argue that, whatever may be the merits of the alternative bases for jurisdiction asserted by appellant,

---

12 It is interesting to note that both the original complaint and the proposed amended complaint invoked Section 717 as one basis of jurisdiction in the district court.

they are pre-empted by Section 717(c). Neither the Act itself nor its legislative history conclusively demonstrates that such pre-emption was intended. Congress enacted Section 717(c) to provide a private right of action for federal employees—a right it believed to have been previously non-existent or so difficult to enforce as to have been in effect non-existent. The most persuasive argument in favor of pre-emption is that the Act constitutes a waiver of sovereign immunity and as such must be strictly construed.

The doctrine of sovereign immunity forbids suits against the government without its consent. Sovereign immunity in the present context involves not only that of the United States but also that of its officers in performing their official functions. As the Eighth Circuit succinctly put it:

> "A suit against an officer of the United States is one against the United States itself 'if the decree would operate against' the sovereign, *Hawaii* v. *Gordon*, 373 U.S. 57, 58, 83 S.Ct. 1052, 1053, 10 L.Ed. 2d 191 (1963); or if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration', *Land* v. *Dollar*, 330 U.S. 731, 738, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947); or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act', *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704, 69 S.Ct. 1457, 1468, 93 L.Ed. 1628 (1949). . . ." *Gnotta* v. *United States*, 415 F.2d 1271, 1277 (8 Cir. 1969) (Blackmun, *J.*), *cert. denied*, 397 U.S. 934 (1970).

The court in *Gnotta* held that demands for promotion and back pay fall within the scope of this immunity as they necessarily involve expenditures from the Treasury and compel the exercise of administrative discretion in an official personnel area. 415 F.2d at 1277. This is precisely the relief demanded in the instant case.

Sovereign immunity would bar prosecution of this action absent an effective waiver. Congress can impose restrictions on its consent to be sued, *Battaglia* v. *United States*, 303 F.2d 683, 685 (2 Cir.), *cert. dismissed*, 371 U.S. 907 (1962), including limitations on the time within which suit must be commenced. *United States* v. *One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1357 (5 Cir. 1972). The consent Congress has given for the instant type of action is set forth in Section 717(c). Such consent is conditioned on compliance with the 30 day filing requirement.

Statutes waiving sovereign immunity are to be strictly construed. But assuming, as appellant argues, that decisions of the Supreme Court illustrate a more liberal attitude with regard to waivers of sovereign immunity at least where a federal agency is concerned, see *Federal Housing Administration* v. *Burr*, 309 U.S. 242 (1940); *Kiefer & Kiefer* v. *Reconstruction Finance Corp.*, 306 U.S. 381 (1939), we cannot ignore the explicit condition imposed by Congress on a suit such as the instant one. It would wholly frustrate Congressional intent to hold that a plaintiff could evade the 30 day filing requirement "by the simple expedient of putting a different label on [his] pleadings." *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-90 (1973).

The instant complaint was filed more than a year after passage of the 1972 Act. Brown had notice of its provisions. He has offered no excuse for failure to comply, nor has he addressed the issue of retroactivity. We find no injustice in requiring compliance with the 30 day filing requirement. On the contrary, to permit suit without compliance with the conditions imposed by Section 717(c) would effectively undermine the strong public policy that requires strict construction of a statute which waives sovereign immunity.[13]

---

13 In view of our holding, we find it unnecessary to consider appellant's claims that jurisdiction can be founded on 28 U.S.C. §1361 (1970)

V. Failure to Exhaust Administrative Remedies

Finally, even if we were to hold in favor of Brown on the issues discussed above, his claim would fall for failure to exhaust administrative remedies under regulations in effect prior to the 1972 Act. Although he pursued these remedies to the extent of obtaining a final agency decision, he failed to appeal to the Board of Appeals and Review of the CSC. See 5 C.F.R. §§713.231 to .234 (1974), 34 Fed. Reg. 5371 (1969).

Assuming without deciding that exhaustion of federal administrative remedies may not be required in every case of alleged discriminatory federal employment practices, cf. *McKart* v. *United States,* 395 U.S. 185 (1969); but see *Penn* v. *Schlesinger,* 490 F.2d 700, 707-14 (5 Cir. 1973) (dissenting opinion), *rev'd en banc,* 497 F.2d 970 (5 Cir. 1974) (adopting panel dissent), there is nothing in the allegations of Brown's complaint which justifies the "premature interruption of the administrative process." *McKart* v. *United States, supra,* 395 U.S. at 193. The "notions of judicial efficiency" stressed by the Court in *McKart* are particularly applicable here:

> "A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene." 395 U.S. at 195.

For aught that appears in the record before us, we cannot say that an appeal to the CSC might not have resulted in granting the relief sought by Brown. Since he did not exhaust his administrative remedies, however, we have been presented with troublesome jurisdictional questions

---

(mandamus); the Administrative Procedure Act, 5 U.S.C. §§701-06 (1970); the Tucker Act, 28 U.S.C. §1346(a) and (b) (1970); and 42 U.S.C. §1981 (1970) and 28 U.S.C. §1343(4) (1970).

which must be resolved before the substantive issue of discrimination can even be considered. See *Penn* v. *Schlesinger, supra,* 490 F.2d at 712.

Moreover, it cannot be said here that the administrative remedies available to Brown were inadequate or futile. Cf. *McKart* v. *United States, supra,* 395 U.S. at 200; *Eisen* v. *Eastman,* 421 F.2d 560, 569 (2 Cir. 1969), *cert. denied,* 400 U.S. 841 (1970). Administrative regulations in effect at the time Brown filed his complaint in the district court (and which remain in effect) provided for retroactive promotion with back pay if discrimination was found. 5 C.F.R. §713.271(b) (1974), 37 Fed. Reg. 22,717 (1972). This essentially is the relief sought in his federal court action. Nor does Brown claim that he had no notice of the appellate relief available (he received two letters so informing him), or that his attempts to seek administrative remedies were frustrated. See *Penn* v. *Schlesinger, supra,* 490 F.2d at 706.

Under the circumstances of this case, we hold that Brown inexcusably failed to exhaust available administrative remedies.

Conclusion

Clearly the federal courts have jurisdiction under Section 717(c) of the Equal Employment Opportunity Act of 1972 to review claims by federal employees of discriminatory employment practices. Brown's failure to comply with the statutory requirements with respect to appealing to the Board of Appeals and Review of the CSC, or by commencing a timely action in the district court, has presented the threshold jurisdictional issues to which this opinion is addressed. We hold that his failure to commence the instant action in the district court within 30 days of the final agency decision is fatal to his com-

plaint since Section 717(c) operates retroactively and preempts any other avenue of judicial review; and that he has failed to exhaust available administrative remedies. The entire process of administrative review by the CSC and of judicial review within the 30 day period for seeking such review makes no sense at all if an employee may simply ignore the statutory requirements.

Affirmed.

Supreme Court, U. S.
FILED
AUG 13 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-768

CLARENCE BROWN,

Petitioner,

v.

GENERAL SERVICES ADMINISTRATION, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 20, 1974
CERTIORARI GRANTED MAY 27, 1975

MERLIN PRESS INC.—N. Y. C. 219

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-768

CLARENCE BROWN,

Petitioner,

v.

GENERAL SERVICES ADMINISTRATION, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX TO APPENDIX*

	PAGE
Relevant Docket Entries	1a
Complaint	3a
Exhibit 1—Complaint of Discrimination	14a
Notice of Motion to Dismiss with Supporting Affidavits	18a
Affidavit of Joel B. Harris	20a
Affidavit of Horst Mueller	22a
Exhibit 1—Complaint of Discrimination	26a

---

* The Memorandum Order of the District Court and the Opinion of the Court of Appeals for the Second Circuit are set forth in the Appendix to the Petition for a Writ of Certiorari at, respectively, p. 1a and p. 2a.

PAGE

Exhibit 2—Letter to Clarence Brown dated October 19, 1972 ..... 30a

Exhibit 3—Letter to William Vega dated October 25, 1972 ..... 33a

Exhibit 4—Findings and Recommended Decision in the Discrimination Complaint 34a

Exhibit 5—Letter to Clarence Brown dated March 23, 1973 ..... 43a

Exhibit 6—Receipt for Certified Mail 45a

Affidavit of Mailing 46a

Motion for Leave to File an Amended Complaint and to Add Parties 48a

Amended Complaint 50a

Order Denying Application to Amend Complaint and Add Parties 62a

Judgment Ordering Dismissal 63a

Notice of Appeal 65a

Certificate of Service 66a

Order Allowing Certiorari 67a

Relevant Docket Entries

DATE	PROCEEDINGS
May 7, 1973	Complaint filed and summons.
July 27, 1973	Filed notice of motion ret. Aug. 10-73 at 2:15 p.m. Room 1106; Re. dismissing the complaint.
September 18, 1973	Filed pltff's notice of motion for leave to file an amended complaint and to add parties-ret. 9-21-73.
September 27, 1973	Filed memo endorsed on government's motion filed 7-27-73—See memorandum decision of this date granting the within motion—MacMahon, J.
September 27, 1973	Filed memo endorsed on pltff's motion to amend filed 9-18-73—The within application to amend the complaint and add parties is denied because this action has been dismissed for want of subject matter jurisdiction, and the proposed amended complaint does not change the situation. See memorandum decision of this date granting defts' motion to dismiss the complaint-So ordered-MacMahon, J. —m.n.
September 27, 1973	Filed memorandum decision—This court lacks subject matter jurisdiction over this action, and deft's mo-

Relevant Docket Entries

DATE	PROCEEDINGS
	tion to dismiss the complaint, pursuant to Rule 12(b), Fed.R.Civ.P., is granted. So ordered—MacMahon, J.—mailed notice.
September 28, 1973	Filed Judgment—defts. have judgment against the pltff. dismissing the complaint—Judgment entered—Clerk—mailed notice ent. 10-1-73
October 24, 1973	Filed pltff's notice of appeal—from final judgment filed 9-28-73—mailed copy to U.S. Attorney.

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 73 Civ. 2026

CLARENCE BROWN,

Plaintiff,

—against—

GENERAL SERVICES ADMINISTRATION, UNITED STATES OF AMERICA, TRANSPORTATION AND COMMUNICATIONS SERVICE, COMMUNICATIONS DIVISION, REGION 2, JOSEPH A. DALY, Regional Director, Transportation and Communications Service, ALBERT GALLO, Chief, Communications Division and FRANK A. LAPOLLA, Acting Chief, Communications Division, Transportation and Communications Service, Region 2,

Defendants.

COUNT I

Jurisdiction of this Court is invoked pursuant to Title VII of the Civil Rights Act of 1964; 28 U.S. Code, §1331, et seq. and the Equal Employment Opportunity Act of 1972 [hereinafter sometimes referred to as "The 1972 Act"], with particular reference to §717 of the 1972 Act, covering discrimination in federal employment. Jurisdiction is specifically enlarged by the said 1972 Act and conferred upon this Court by 42 U.S. Code §2000e-5(g) and 28 U.S. Code §§2201 and 2202. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights

secured by (a) 42 U.S. Code §§2000e et seq., providing for injunctive and other relief against racial discrimination in employment and (b) 42 U.S. Code §1981, providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States.

COUNT II

Paintiff is a citizen of the United States and resides at 468 Ralph Street, Franklin Township, Somerset, New Jersey. He is a Negro, or black.

(b) The defendants have their place of business at 26 Federal Plaza, in the City, County and State of New York, known as Region 2 of the General Services Administration of the United States Government.

(c) Plaintiff was employed in the title and grade of Communications Specialist, GS 7, under the immediate supervision of the defendant, Albert Gallo, Chief, Communications Division, Transportation and Communications Service, Region 2.

COUNT III

Nature of Proceeding

This is a proceeding alleging racial discrimination by the defendants Joseph A. Daly, Albert Gallo and Frank A. Lapolla, as the plaintiff's superiors at Region 2 of the General Services Administration. The General Services Administration has been joined as a party defendant because it tolerated the alleged racial discrimination to exist and to continue to exist, despite the complaints of the plaintiff hereinafter referred to and described. The United States Civil Service Commission has been joined as a party

defendant because, in entertaining and ruling upon the plaintiff's complaint of racial discrimination, it acted in an arbitrary and capricious manner by failing to make the in-depth inquiry into the alleged racial discrimination as, under the said Civil Rights Act of 1964 and the Act as amended in 1972, it was required to do. It will not be claimed that the alleged racial discrimination was against Negro employees as a class, but only that it was improperly, unlawfully and illegally exercised against the plaintiff, as a black man with individualistic and distinctive qualities which the defendants found offensive only because the plaintiff is a Negro and black and because such individualistic qualities did not fit the stereotypical qualities which the defendants, who are white, expected in a black man and an American citizen. It is further contended that the conduct of the individual defendants discriminated against the plaintiff racially and in ways which deprived the plaintiff of equal employment opportunities and otherwise adversely affected plaintiff's former status as an employee of the General Services Administration, by delimiting and preventing his promotion in said employment, despite the plaintiff's merit qualifications and his seniority as an employee of the said Governmental agency for upwards of fifteen years.

Plaintiff claims that his denial of promotion and his eventual departure from the Agency were retaliatory in nature and based primarily upon his race and color and an attitude of distinctive manliness which in no way detracted from the superior merit of his work.

COUNT IV

Nature of Racial Discrimination

The particular nature of the racial discrimination here claimed, all to the detriment, deprivation and loss of the plaintiff's civil rights, is that the plaintiff was deprived of merited and earned promotion by the following several circumstances, to wit:

(a) The individual defendants, acting for and in the Communications Division of the Transportation and Communications Service, entered into secret and illegal agreements in and among themselves, to establish a promotional system especially geared to the plaintiff, with the design, intent and purpose which is to continue and preserve, and which has the effect of continuing and preserving an illegal, improper, arbitrary and capricious policy, practice, custom and usage, against the plaintiff of limiting, cutting off, annulling and destroying the promotional opportunity of the plaintiff solely on the basis of his race and color. Those discriminatory policies and practices are described as follows:

(i) In June, 1971, plaintiff, although well qualified and with seniority, was not selected for promotion to the title of GS-9. It is alleged that he was deliberately passed over. At that time, the asserted reason for his non-promotion was that there was a "voice" deficiency, that is, that the plaintiff lacked "voice experience." After plaintiff filed an administrative complaint because of his non-selection for promotion in 1971, he was duped and tricked into believing that "lack of voice experience" was the true, real and genuine reason for his non-selection by the defendant Gallo, and plaintiff discontinued his complaint.

(ii) Thereafter, plaintiff acquired full voice experience and when another opening for the title GS-9 arose, plaintiff applied for said promotion, again, on the basis of his qualifications, his seniority and his acquisition of voice experience. Again, the plaintiff was passed over, with the alleged excuse, reason or subterfuge being given that plaintiff had not been "co-operative" on an occasion wholly unrelated to any performance of his job title or the title of GS-9, which said reason was not a true and genuine reason, but which was advanced and given to cloak and obscure a prohibited discrimination against the plaintiff based solely upon his race and color.

(iii) In June, 1971, when the plaintiff was passed over, or denied the sought promotion to GS-9, the "reason" spuriously advanced at that time was the alleged lack of "voice experience." Nothing was then mentioned about any alleged refusal to perform any assignment, although the alleged "failure" to perform was said to have occurred in March, 1971, well before the said June 1971 incident of being "passed over."

(iv) The circumstances of the "passing over," as stated by the defendants, was but a sham, a pretense and a fraud to cover up the racial discrimination then being exerted and practiced against the plaintiff because of the plaintiff's race and color.

(b) Subsequently and by reason of the sham and fraud practiced against the plaintiff, he agreed to undertake further training, having accepted in good faith the representations of the defendants concerning his experience; he acquired the said experience theretofore alleged to be absent; he acquired further qualifications, including special educational courses taken at his own expense and upon

his own time; the said circumstances, coupled with his long enduring seniority, gave him superior qualifications for promotion to the next vacancy for the title of GS-9.

(c) When said vacancy did in fact occur in 1972, plaintiff was described as "qualified," by reason of the excellence of his professional background and record.

(d) Despite plaintiff's qualifications, a white colleague, with less qualifications and less seniority, was appointed to the vacancy, the title of which the plaintiff had been considered for in 1971 and for which the plaintiff had been induced by lies and racial discrimination to aspire to in the said 1972.

(e) Defendant was "passed over" a second time in 1972, for the false, invented, concocted and pretended "reason" that he lacked certain qualities of co-operativeness and had refused to do certain work when ordered by a superior to do said work. The said sham, pretense and invention advanced as a false reason for disqualifying the plaintiff for the said promotion, was merely the convenient cover-up and camouflage for the wrongful, illegal and improper racial discrimination brought to bear against the plaintiff. In fact and in truth, the genuine and real reason for the plaintiff's failure to be promoted was the sum of the acts of racial discrimination against the plaintiff, all of which are prohibited by the Civil Rights Act of 1964 and the 1972 amendments to said Act.

(f) Upon information and belief, the defendants, in their relationships with the plaintiff, invoked antiquarian standards on which approval of the plaintiff would be based; in general, and specifically, with respect to the plaintiff, the defendants regarded members of the Negro

race as inferior and expected from Negroes, a fawning, humble and self-effacing attitude, exhibiting gratitude and cowering timidity in the presence of whites in a superior job position. The plaintiff, on the other hand, is a black citizen who exhibits pride in himself, pride in his abilities, his background and his extensive education and job skills. The defendants construed this attitude to be one of hostile arrogance, instead of pride and the said defendants resented such attitude on plaintiff's part and agreed among themselves to penalize the plaintiff because he possessed racial attitudes and characteristics of individuality and personality which disagreed with defendants' stereotyped attitudes and expectations and the said defendants did in fact and in truth penalize the plaintiff and said penalties of discrimination and preference for others who were less qualified than plaintiff and members of the white race, all to the sore abuse and breach of the said Civil Rights Act of 1964 and the 1972 Amendments thereto, and all to plaintiff's harm, deprivation and proscribed loss and detriment.

(g) In consequence of said conduct, attitude and illegal discrimination on the part of the defendants, acting both together and singly, the plaintiff's career with the United States Government has been forever ruined, after over fifteen years of loyal and skillful service to the United States of America in positions of trust and fidelity, including the loss of plaintiff's job, as well as the loss of opportunities to be advanced on merit in his career of Federal employment. Plaintiff has been further so diminished in his morale that he has been compelled to seek redress of the grievous wrongs done to him and his career by resorting to litigation in this Court, all of

which places a heavy burden upon him and his meager resources and his diminished estate.

(h) The plaintiff's wrongful discharge, occasioned by the wrongdoing and breach of Federal statute as alleged herein, was occasioned by said wrongful and racially discriminatory acts of the defendants and not by reason of any fault or lack on the part of the plaintiff.

COUNT V

The Acts of the Civil Service Commission

The particular acts of the United States Civil Service Commission which warrant the relief hereinafter requested and prayed for by the plaintiff, are as follows:

(a) Following the prohibited racial discrimination against the plaintiff in his employment as aforesaid, the plaintiff, pursuant to rules and regulations relating to employee complaints, filed a formal complaint with the United States Civil Service Commission, alleging a wrongful racial discrimination against him connected with his employment.

(b) A hearing was held in due course upon such complaint and after the completion thereof, the hearing officer made his findings and recommendations, claiming that there was no racial discrimination, but that the plaintiff had failed to be promoted to GS-9 because of his attitude and not because of any racial discrimination against him.

(c) This finding was an arbitrary and capricious determination and not based upon truth and the facts in dispute and was and is illegal and improper in the following respects, to wit:

(i) The determination arrived at after the said hearing, was a conclusion which had been decided upon prior to the said hearing.

(ii) The said hearing was but a sham and a fraud convened to simulate propriety and allegiance to the law when, in fact, the conclusion had been predetermined and the said hearing was but a form to cloak a decision arrived at prior thereto.

(iii) The hearing officer was not sensitive to the subtle nuances of racial discrimination and the manifold indirect ways of a white society to penalize an individualistic and distinctive Negro.

(iv) The hearing officer accepted as truth and gave prohibitive value to the rankest kind of hearsay, gossip and untruth in reaching his conclusion, in the absence of sworn testimony to support an otherwise naked conclusion, especially with respect to a witness, Fred Mandato, who testified that certain "incidents" were brought to his attention, concerning the plaintiff; that other "individuals" had mentioned the plaintiff to him critically; that he was "told" that plaintiff had gone to lunch, instead of completing certain work, although he confessed that he had no knowledge of what the plaintiff's superior may have instructed or told plaintiff. Such accumulations of hearsay and gossip in the record were, in sum, a sinister totality, adding to the improper discrimination against the plaintiff and added up to the arbitrariness and capriciousness of the hearing officer in reaching his prohibited determination concerning the plaintiff's complaints. The said hearing officer further allowed in the record and considered against the plaintiff various matters of alleged complaint which occurred long

after the critical periods under consideration, all to the arbitrary and capricious prejudice against the plaintiff. The hearing officer also accepted against the plaintiff, testimony claiming improprieties on the part of the plaintiff, even though there had never been any complaint after such alleged improprieties and nothing appeared in plaintiff's personnel folder relating to such matters, all of which was prejudicial, wrongful, improper, capricious and arbitrary.

(v) The hearing officer employed standards by which he judged the plaintiff which were so subjective as to be vague and improper, such as the claim that the plaintiff had no close friends in his employment, which bore no objective relationship to the plaintiff's abilities and professional competence whatsoever.

COUNT VI

Plaintiff's Administrative Complaint

Within ninety days of the occurrence of the claimed racial discrimination against the plaintiff as herein set forth, plaintiff filed his written charges under oath with the Civil Service Commission, alleging a breach of the Equal Employment Opportunity Act and the amendments of 1972, his rights under Title VII of the Civil Rights Act of 1964.

Under date of December 13, 1972, the said Civil Service Commission held a hearing on the plaintiff's administrative complaint and, under date of February 9, 1973, the said hearing officer rendered his decision and determination finding that the evidence did not support plaintiff's allegations of racial discrimination and he recommended no corrective action in plaintiff's behalf.

For all of the reasons set forth in Count IV and the preceding Counts of this complaint, it is claimed by the plaintiff that the handling of his complaint, the hearing and the determination reached by the hearing officer, were all arbitrary, capricious, illegal and improper and in violation of the spirit, the letter and the remedial intention of the Civil Rights Act of 1964 and the 1972 amendments to the said Act, all to the plaintiff's deprivation of due process and the protections intended and mandated by the said Civil Rights Act and the plaintiff's employment rights.

Following the receipt by the plaintiff of the advice that his complaint had been dismissed administratively, and within the time permitted by statute, allowing him to institute a civil action for redress of his grievances, the plaintiff has commenced this said civil action.

Although both the City and State of New York have bureaus and departments administering human rights agencies to bar job discrimination, upon information and belief, the Civil Rights Act of 1964 and the 1972 amendment of the act, pre-empt the field with respect to complaints of racial discrimination in federal employment and jurisdiction as heretofore alleged, is conferred upon this court by federal statute. A copy of plaintiff's administrative complaint is annexed hereto as an exhibit and made a part of this complaint.

COUNT VII

If the relief hereinafter prayed for is not granted, the plaintiff will be irreparably denied rights secured to him by the Civil Rights Act of 1964 and the 1972 amendment thereof.

Plaintiff has no adequate remedy at law to redress the wrongs described above.

Complaint

WHEREFORE, plaintiff prays as follows: That this Court grant such relief as may be appropriate, including injunctive orders, damages, costs, attorney's fees and back pay.

/s/ CLARENCE BROWN
Plaintiff's Signature

GREENUP and MILLER
Atorneys for Plaintiff
277 Broadway
New York, N. Y. 10007
Tel.: 666-8880

By: /s/ JOSEPH GREENUP
A Member of the Firm

Dated: April 30, 1973.

Exhibit 1 Annexed to Complaint
(Complaint of Discrimination in the Federal Government)

(See Opposite) ☞

COMPLAINT OF DISCRIMINATION IN THE FEDERAL GOVERNMENT
BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

(Please Type or Print)

(FOR AGENCY USE) (7)

1. WHAT IS YOUR (COMPLAINANT'S) FULL NAME?
Clarence Brown

2. WHAT IS YOUR TELEPHONE NUMBER INCLUDING AREA CODE IF YOU KNOW IT?

YOUR STREET ADDRESS (OR RD NUMBER OR POST OFFICE BOX NUMBER)
468 Ralph Street

HOME PHONE:
201 846 6742

YOUR CITY | STATE | ZIP CODE
Somerset, New Jersey | | 08873

WORK PHONE:
212-264-1266 ✓

3. WHICH FEDERAL OFFICE DO YOU BELIEVE DISCRIMINATED AGAINST YOU? *(Prepare a separate complaint form for each office which you believe discriminated against you.)*

A. NAME OF OFFICE WHICH YOU BELIEVE DISCRIMINATED AGAINST YOU:
T.C.S Communications Divn

B. STREET ADDRESS OF OFFICE:
26 Federal Plaza rm 2747

C. CITY | STATE | ZIP CODE
New York, New York 10007

D. NAME AND TITLE OF PERSON(S) YOU BELIEVE DISCRIMINATED AGAINST YOU *(If you know)*:
Mr. J. Daley, Mr. A. Gallo, Mr. F. Lapolla

4. ARE YOU NOW WORKING FOR THE FEDERAL GOVERNMENT?
☒ YES (ANSWER A, B, C AND D BELOW.)
☐ NO (CONTINUE WITH QUESTION 5.)

A. NAME OF AGENCY WHERE YOU WORK:
General Services Administration

B. STREET ADDRESS OF YOUR AGENCY:
26 Federal Plaza room 2747

C. CITY | STATE | ZIP CODE
New York, New York 10007

D. WHAT IS THE TITLE AND GRADE OF YOUR JOB?
Communications ~~Assistant~~ Specialist GS-7

5. DATE ON WHICH MOST RECENT ALLEGED DISCRIMINATION TOOK PLACE:

MONTH	DAY	YEAR
6	27	71

6. CHECK BELOW WHY YOU BELIEVE YOU WERE DISCRIMINATED AGAINST. BECAUSE OF YOUR:
☒ RACE OR COLOR. IF SO, SHOW YOUR RACE OR COLOR American Negro (Black)
☐ RELIGION. IF SO, SHOW YOUR RELIGION _____
☐ NATIONAL ORIGIN. IF SO, SHOW YOUR NATIONAL ORIGIN _____
☐ SEX. IF SO, STATE YOUR SEX. _____

7. EXPLAIN HOW YOU BELIEVE YOU WERE DISCRIMINATED AGAINST (TREATED DIFFERENTLY FROM OTHER EMPLOYEES OR APPLICANTS) BECAUSE OF YOUR RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN. *(You may continue your answer on another sheet of paper if you need more space.)*

I believe that i was discriminated against because of the following reasons: (further see my personal letter dated 7-9-71)
(A) Was'nt considered for GS-9 Communications Specialist positions, five consecutive times (1967, 1968, 1969, 1970, & 1971) (further see the attachment (B) through (I)

8. I HAVE DISCUSSED MY COMPLAINT WITH AN EQUAL EMPLOYMENT OPPORTUNITY COUNSELOR *(See instructions)*:
☒ YES ☐ NO

9. WHAT CORRECTIVE ACTION DO YOU WANT TAKEN IN YOUR BEHALF ON YOUR COMPLAINT?
I would like to be promoted to a GS-9 Communications Specialist position in the Communications Management Branch and further considered for future educational and promotional opportunities.
I definitely am entitled to that position, because I am better qualified.

10. DATE OF THIS COMPLAINT

MONTH	DAY	YEAR
7	15-71	

11. SIGN YOUR (COMPLAINANT'S) NAME HERE:
Clarence Brown EXHIBIT 1

CSA DC 71-939

SEE REVERSE SIDE OF FORM FOR INSTRUCTIONS.

15a

Exhibit 1 Annexed to Complaint

7. Explain how you believe you were discriminated against (treated differently from other employees or applicants) because of your race, color, religion, sex, or national origin. (continued from CSC form 894)

(B) Abolishment of GS-9 Communications Specialist position during the years 1967-1968.

(C) I have not been promoted during the past five years and other employees within the TCS Division have steadily advanced themselves (these individuals have almost the exact amount of tenure as I have) to GS-11 and GS-12 positions.

(D) I Received the GS-9 eligibility rating on the Mid-level management examination (Category Communications Management) and still I have not been promoted.

(E) Since my last promotion 5 years ago my job knowledge and skills have increased tremendously—(example) Civil Service and College completion training.

(F) Mr. Ownbey was promoted approximately two years ago (from a GS-5 communicator to a GS-7 Communications Asst) and now after two years, he is a GS-9 Communications Specialist, with no direct supervisory experience with personnel etc. I also have approximately ten years of supervisory experience in the communications field. I am better qualified than Robert Ownbey and I definitely feel that I have been discriminated against.

(G) In accordance with Mr. Russell's report Mr. Gallo, and Mr. Daly, said that I was not cooperative and

Exhibit 1 Annexed to Complaint

cited two specific examples. During the month of March 1971, between the hours of 5 pm-6 pm (without compensatory or overtime) Mr. Gallo, however, did ask me to conduct a survey (for a period of 6 months—GSA Teletype Cntr) *AS A FAVOR TO HIM AND NOT AS A DIRECT ORDER.* If Mr. Gallo, thought I was *SO UNCOOPERATIVE,* why wasn't any adverse action or memo statements brought against me at that time. No one accused me of being uncooperative until I questioned why I was not considered for the job, during the month of July 1971.

(H) On December 9, 1970, Mr. William Trost was promoted to Communications Specialist GS-9. I asked Mr. Gallo, why I wasn't selected for this position. He stated that I did not have any *voice experience.* I have acquired voice experience since that time and yet Mr. Robert Ownbey, received the promotion, dated 6-27-71. Mr. Gallo's motives and decisions are discriminatory against me and no matter how much experience, knowledge or education I attain; he will never promote me.

(I) General harassment and reprisal tactics have been performed by the Communications Division.

CLARENCE BROWN, July 16, 1971
/S/ CLARENCE BROWN

Notice of Motion to Dismiss with Supporting Affidavits

(Title omitted in printing)

SIRS:

PLEASE TAKE NOTICE that the undersigned will move this Court on the 10th day of August, 1973, in Courtroom 1106, United States Court House, Foley Square, New York, New York at 2:15 P.M., or as soon thereafter as counsel may be heard, for an order dismissing the complaint, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, on the ground that the Court lacks subject matter jurisdiction over this action.

Dated: New York, New York
July 27, 1973.

Yours, etc.

PAUL J. CURRAN
United States Attorney for the Southern District of New York
Attorney for Defendants

By: JOEL B. HARRIS
Assistant United States Attorney
Office & Post Office Address
U.S. Courthouse
Foley Square, New York,
N.Y. 10007
Tel.: 264-6435

Notice of Motion to Dismiss with Supporting Affidavits

To:

GREENUP AND MILLER, Esqs.
Attorney for Plaintiffs
Office & Post Office Address:
200 West 135th Street, Suite 218
New York, New York 10030

Affidavit of Joel B. Harris

(Title omitted in printing)

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, ss.:

JOEL B. HARRIS, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York, and I am fully familiar with and in charge of this matter. I submit this affidavit in support of the defendants' motion to dismiss the complaint, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, on the ground that the Court lacks subject matter jurisdiction over this action.

2. The facts are detailed in the affidavit of Horst Mueller, dated June 19, 1973, which is submitted herewith.

3. Plaintiff brought this action against his employing agency, General Services Administration, and certain of its officers, alleging discrimination in their failure to promote him (Complaint, Count IV) and the failure of the United States Civil Service Commission, which has not been named as a defendant, despite the contrary statement in Count III, to make an in-depth inquiry into the alleged racial discrimination (Counts III, V). He seeks "such relief as may be appropriate, including injunctive orders, damages, costs, attorney's fees and back pay."

Plaintiff alleges that he filed a complaint of discrimination which led to an agency decision of "no discrimination." Although plaintiff alleges that the Civil Service Commission held the hearing (Count V), the Mueller affidavit makes clear that the decision was rendered by the

General Services Administration Director of Civil Rights (¶ 3C and D). Exhibit 5 to the Mueller affidavit is a copy of the certified letter sent to plaintiff, advising him of the final agency decision and his right to either appeal to the Civil Service Commission Board of Appeals and Review within 15 days of its receipt, or to file a civil action in federal court within 30 days of its receipt. Exhibit 6 to the Mueller affidavit is a certified mail receipt indicating that plaintiff received said letter on March 26, 1973.

No appeal to the Civil Service Commission has been filed, and plaintiff did not file his complaint in this action until May 7, 1973, too late to comply with the applicable limitation period.

4. As the accompanying memorandum of law makes clear, none of the statutes relied upon by plaintiff gives this Court jurisdiction over the subject matter of this action.

WHEREFORE, defendants' motion to dismiss the complaint with prejudice should be granted in all respects.

/s/ JOEL B. HARRIS
Assistant United States Attorney

Sworn to before me this
27th day of July, 1973.

MARY L. AVENT
Notary Public

MARY L. AVENT,
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. Filed in Bronx County
Commission Expires March 30, 1975

Affidavit of Horst Mueller

(Title omitted in printing)

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

HORST MUELLER, being first duly sworn, deposes and says:

1. I am the Regional Personnel Officer, Region 2, of the General Services Administration, an agency of the United States of America, one of the above-named defendants. The above-named defendant Frank Lapolla is presently employed by General Services Administration, Region 2, as Director, Telecommunications Division, Automated Data and Telecommunications Service. The above-named defendant Joseph A. Daly was employed by General Services Administration, Region 2, as Regional Director, Transportation and Communications Service until his retirement on June 30, 1972. The above-named defendant Albert Gallo was employed by General Services Administration, Region 2, as Chief, Communications Division, Transportation and Communications Service until his retirement on March 22, 1972.

2. I make this affidavit in support of a motion on behalf of General Services Administration and all other defendants to dismiss the above-entitled action.

3. I am acquainted with the plaintiff, Clarence Brown, and am familiar with his personnel records, all of which are under my custody and control. An examination of these records discloses the following facts:

A. Plaintiff is now, and has been continuously since 1957, an employee of the General Services Administration. Con-

trary to the allegations in Paragraph (g) of Count IV of the Complaint in the above-entitled action, he has not lost his job with General Services Administration and is and has been continuously employed to the present date. His position is Communications Specialist, GS-7, Telecommunications Division, Automated Data and Telecommunications Service, General Services Administration, New York.

B. On July 15, 1971, plaintiff filed with the General Services Administration Equal Opportunity Officer, an administrative complaint of racial discrimination in the Federal Government. (Exhibit 1) He claimed that his non-selection for promotion to the position of Communications Assistant, GS-9 and the promotion of a white employee to that position, effective on June 27, 1971, constituted discrimination because of his race. After a review and analysis of the investigative report on plaintiff's complaint of discrimination, the Regional Administrator, Region 2, determined that there was no evidence of racial discrimination and so informed the plaintiff by letter dated October 19, 1972. (Exhibit 2) The plaintiff did not accept the agency decision and by letter dated October 25, 1972, requested a hearing. (Exhibit 3)

C. Pursuant to 5 CFR Section 713.218, the requested hearing was held on December 13, 1972 at 26 Federal Plaza, New York City before Complaints Examiner John E. Selbmann of the U.S. Civil Service Commission, at which testimony was taken and a transcript was prepared. Following the hearing, Findings and a Recommended Decision dated February 9, 1973 were prepared by Mr. Selbmann and transmitted to General Services Administration. (Exhibit 4) Mr. Selbmann found no evidence of discrimination and recommended that no action be taken on the complaint.

Affidavit of Horst Mueller

D. By certified letter dated March 23, 1973 addressed to plaintiff (Exhibit 5), the General Services Administration Director of Civil Rights, E. E. Mitchell, rendered the final agency decision that the evidence of the case did not support the complaint of racial discrimination. In accordance with 5 CFR 713.221, a copy of the transcript of the hearing and the findings and Recommended Decision of the Complaints Examiner were enclosed in said letter dated March 23, 1973. Plaintiff was advised by said letter that if the decision did not meet his satisfaction, he could file an appeal in writing with the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D.C. within 15 calendar days of the receipt of said letter dated March 23, 1973 and that plaintiff also had the right to file a civil action in the Federal District Court within 30 calendar days of receipt of the letter. The certified mail receipt of the above-mentioned letter of March 23, 1973 indicates that it was received on March 26, 1973. A copy of the receipt is attached hereto as defendant's Exhibit 6.

4. I am informed and believe that the plaintiff filed no appeal with the Board of Appeals and Review, U.S. Civil Service Commission.

5. Plaintiff's Complaint in the above-entitled action was filed in this court on May 7, 1973, more than 30 days after the receipt of the final agency decision letter dated March 23, 1973. The Summons and Complaint were served upon defendants General Services Administration and Frank A. Lapolla on May 14, 1973.

/s/ HORST MUELLER
HORST MUELLER

Affidavit of Horst Mueller

Sworn to before me this
19th day of June, 1973.

PAUL CIRILLO
Notary Public

PAUL CIRILLO
Notary Public, State of New York
Qualified in Nassau County
Cert. Filed with the New York Co. Clerk
Commission Expires March 30, 1974

Exhibit 1 Annexed to Affidavit of Horst Mueller
(Complaint of Discrimination in the Federal Government)

(See Opposite) ☞

COMPLAINT OF DISCRIMINATION IN THE FEDERAL GOVERNMENT
BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

(Please Type or Print)

(FOR AGENCY USE) (7)

27a

27a

1. WHAT IS YOUR (COMPLAINANT'S) FULL NAME?
Clarence Brown

2. WHAT IS YOUR TELEPHONE NUMBER INCLUDING AREA CODE IF YOU KNOW IT?

YOUR STREET ADDRESS (OR RD NUMBER OR POST OFFICE BOX NUMBER)
468 Ralph Street

HOME PHONE:
201 846 6742

YOUR CITY | STATE | ZIP CODE
Somerset, New Jersey | 08873

WORK PHONE:
212-264-1266 ✓

3. WHICH FEDERAL OFFICE DO YOU BELIEVE DISCRIMINATED AGAINST YOU? *(Prepare a separate complaint form for each office which you believe discriminated against you.)*

4. ARE YOU NOW WORKING FOR THE FEDERAL GOVERNMENT?
☒ YES (ANSWER A, B, C AND D BELOW.)
☐ NO (CONTINUE WITH QUESTION 5.)

A. NAME OF OFFICE WHICH YOU BELIEVE DISCRIMINATED AGAINST YOU:
T.C.S Communications Divn

A. NAME OF AGENCY WHERE YOU WORK:
General Services Administration

B. STREET ADDRESS OF OFFICE:
26 Federal Plaza rm 2747

B. STREET ADDRESS OF YOUR AGENCY:
26 Federal Plaza room 2747

C. CITY | STATE | ZIP CODE
New York, New York 10007

C. CITY | STATE | ZIP CODE
New York, New York 10007

D. NAME AND TITLE OF PERSON(S) YOU BELIEVE DISCRIMINATED AGAINST YOU *(If you know)*:
Mr. J. Daley, Mr. A. Gallo, Mr. E. Ubrolle

D. WHAT IS THE TITLE AND GRADE OF YOUR JOB?
Communications ~~Assistant~~ Specialist GS-7

5. DATE ON WHICH MOST RECENT ALLEGED DISCRIMINATION TOOK PLACE:

MONTH	DAY	YEAR
6	27	71

6. CHECK BELOW WHY YOU BELIEVE YOU WERE DISCRIMINATED AGAINST, BECAUSE OF YOUR:
☒ RACE OR COLOR. IF SO, SHOW YOUR RACE OR COLOR American Negro (Black)
☐ RELIGION. IF SO, SHOW YOUR RELIGION _____
☐ NATIONAL ORIGIN. IF SO, SHOW YOUR NATIONAL ORIGIN _____
☐ SEX. IF SO, STATE YOUR SEX. _____

7. EXPLAIN HOW YOU BELIEVE YOU WERE DISCRIMINATED AGAINST (TREATED DIFFERENTLY FROM OTHER EMPLOYEES OR APPLICANTS) BECAUSE OF YOUR RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN. *(You may continue your answer on another sheet of paper if you need more space.)*

I believe that i was discriminated against because of the following reasons: (further see my-personal letter dated 7-9-71)
(A) Was'nt considered for GS-9 Communications Specialist positions, five consecutive times (1967, 1968, 1969, 1970, & 1971) (further see the attachment (B) through (I)

8. I HAVE DISCUSSED MY COMPLAINT WITH AN EQUAL EMPLOYMENT OPPORTUNITY COUNSELOR *(See instructions)*:
☒ YES ☐ NO

9. WHAT CORRECTIVE ACTION DO YOU WANT TAKEN IN YOUR BEHALF ON YOUR COMPLAINT?

I would like to be promoted to a GS-9 Communications Specialist position in the Communications Management Branch and further considered for future educational and promotional opportunities.

I definitely am entitled to that position, because I am better qualified.

BEST COPY AVAILABLE

10. DATE OF THIS COMPLAINT

MONTH	DAY	YEAR
7	15-71	

11. SIGN YOUR (COMPLAINANT'S) NAME HERE:
Clarence Brown

GSA FPR 71-333

SEE REVERSE SIDE OF FORM FOR INSTRUCTIONS.

Exhibit 1 Annexed to Affidavit of Horst Mueller

7. Explain how you believe you were discriminated against (treated differently from other employees or applicants) because of your race, color, religion, sex, or national origin. (continued from CSC form 894)

(B) Abolishment of GS-9 Communications Specialist position during the years 1967-1968.

(C) I have not been promoted during the past five years and other employees within the TCS Division have steadily advanced themselves (these individuals have almost the exact amount of tenure as I have) to GS-11 and GS-12 positions.

(D) I Received the GS-9 eligibility rating on the Mid-level management examination (Category Communications Management) and still I have not been promoted.

(E) Since my last promotion 5 years ago my job knowledge and skills have increased tremendously—(example) Civil Service and College completion training.

(F) Mr. Ownbey was promoted approximately two years ago (from a GS-5 communicator to a GS-7 Communications Asst) and now after two years, he is a GS-9 Communications Specialist, with no direct supervisory experience with personnel etc. I also have approximately ten years of supervisory experience in the communications field. I am better qualified than Robert Ownbey and I definitely feel that I have been discriminated against.

(G) In accordance with Mr. Russell's report Mr. Gallo, and Mr. Daly, said that I was not cooperative and

Exhibit 1 Annexed to Affidavit of Horst Mueller

cited two specific examples. During the month of March 1971, between the hours of 5 pm-6 pm (without compensatory or overtime) Mr. Gallo, however, did ask me to conduct a survey (for a period of 6 months—GSA Teletype Cntr) *AS A FAVOR TO HIM AND NOT AS A DIRECT ORDER.* If Mr. Gallo, thought I was *SO UNCOOPERATIVE,* why wasn't any adverse action or memo statements brought against me at that time. No one accused me of being uncooperative until I questioned why I was not considered for the job, during the month of July 1971.

(H) On December 9, 1970, Mr. William Trost was promoted to Communications Specialist GS-9. I asked Mr. Gallo, why I wasn't selected for this position. He stated that I did not have any *voice experience.* I have acquired voice experience since that time and yet Mr. Robert Ownbey, received the promotion, dated 6-27-71. Mr. Gallo's motives and decisions are discriminatory against me and no matter how much experience, knowledge or education I attain; he will never promote me.

(I) General harassment and reprisal tactics have been performed by the Communications Division.

CLARENCE BROWN, July 16, 1971
/s/ CLARENCE BROWN

Exhibit 2 Annexed to Affidavit of Horst Mueller

(Letter to Clarence Brown dated October 19, 1972)

October 19, 1972

Mr. Clarence Brown
468 Ralph Street
Franklin Township
Somerset, New Jersey 08873

Dear Mr. Brown:

As a result of thoroughly reviewing and analyzing the investigative report on your complaint of discrimination, we found no evidence of racial discrimination.

Under the GSA Promotion Plan which operates in accordance with the requirements of Chapter 335, Federal Personnel Manual, the selection for advancement was made from among the best qualified candidates without discrimination for any nonmerit reasons such as age, sex, race, color, religion, national origin, marital status, lawful political affiliation, physical handicap, membership or nonmembership in an employee organization, and without favoritism based on personal relationship or patronage.

There is not sufficient evidence in the complaint file to indicate either administrative errors in the selection of Robert Ownbey or racial discrimination against you.

Investigation did disclose that minority personnel in the Communications Division, TCC, have received a larger percent of training, appointment, and promotions during the last three years than their representation in the workforce.

Exhibit 2 Annexed to Affidavit of Horst Mueller

Based on the foregoing I am not proposing any remedial, corrective or disciplinary action.

If this proposed agency decision is unacceptable to you, you have the right to request a hearing on the complaint with a subsequent decision by the Director of Civil Rights. The hearing would be conducted by a complaints examiner who is from another agency and who has been certified by the Civil Service Commission. If you desire a hearing, you must within 7 calendar days from receipt of this letter contact the Regional WDO Officer, Mr. William Vega, on telephone number 264-1299, GSA 26 Federal Plaza, NY, Room 2713.

If you do not contact Mr. Vega within 7 calendar days, this proposed agency decision becomes the final agency decision on your complaint. You would then have the right to appeal the final agency decision to the Board of Appeals and Review, U. S. Civil Service Commission, Washington, DC 20415 within 15 calendar days of receipt of this letter. You would also have the right to file a civil action in Federal district court within 30 calendar days of receipt of this letter.

(signed) Gerald J. Turetsky
Gerald J. Turetsky
Regional Administrator

Exhibit 2 Annexed to Affidavit of Horst Mueller

Concurrences:2ARE WILLIAM VEGA
William Vega

cc: 2A (2)
Official file
Reading file
WVega:lad:10/5/72:264-1299
Director of Civil Rights—AR

2AR BETTY GRANGER REID
Betty Granger Reid

ALFRED KLEINFELD
2B—
Alfred Kleinfeld
Regional Director of Administration

Exhibit 3 Annexed to Affidavit of Horst Mueller

(Letter to William Vega dated October 25, 1972)

Mr. Clarence Brown
468 Ralph Street
Somerset, NJer 08873

Mr. William Vega
Equal Employment
Opportunity Ofcr
Ofc of Civil Rights
26 Federal Plaza rm 2713B
New York, New York 10007

October 25, 1972

Dear Mr. Vega:

I have reviewed Mr. Gerald Turetsky's analyzing investigative report of October 19, 1972 and I do not concur with its findings. It is requested, that a hearing be arranged at your earliest convenience.

Sincerely,

/s/ CLARENCE BROWN
Mr. Clarence Brown

Exhibit 4 Annexed to Affidavit of Horst Mueller

(Findings and Recommended Decision in the Discrimination Complaint)

OF:

COMPLAINANT:

Clarence Brown
468 Ralph Street
Somerset, New Jersey 08873

REPRESENTATIVE:

Thomas Hoffman
Attorney-at-Law
2875 Broadway
New York, New York 10025

AGENCY:

General Services Administration
Region 2
26 Federal Plaza
New York, New York 10007

REPRESENTATIVE:

Charles C. Luetke
Office of Regional Counsel
General Services Administration
Region 2
26 Federal Plaza
New York, New York 10007

COMPLAINT:

Non-Selection for Promotion based upon discrimination because of race (Black-American Negro)

Exhibit 4 Annexed to Affidavit of Horst Mueller

COMPLAINTS EXAMINER:

John E. Selbmann
U. S. Civil Service Commission
26 Federal Plaza
New York, New York 10007

DATE OF HEARING:

December 13, 1972

INTRODUCTION

On Wednesday, December 13, 1972, at 26 Federal Plaza, New York, New York, a hearing was held on this complaint of discrimination, based upon race. Personal testimony was obtained from complainant and five witnesses; additional record evidence was submitted and included in the record as Hearing Exhibits 1 through 3.

ISSUES

Whether complainant's non-selection for promotion to the position of Communications Assistant, GS-9, and the promotion of a white employee to that position, effective on June 27, 1971, constituted discrimination because of his race.

BACKGROUND

In September 1970, Region 2, General Services Administration, issued a vacancy announcement for a series of positions to be filled under the agency Merit Promotion Plan. The opening date for the filing of applications was September 28, 1970, and a closing date was established of October 8, 1970. Among the vacancies announced under Announce-

ment No. 93-71 was that of Communications Specialist, GS-9, located in New York, New York.

According to the agency Merit Promotion Plan, promotion registers were to be established, based upon this Announcement, and utilized in order to fill both current vacancies, together with all future vacancies at the same title and grade, that might arise within one year of the closing date of this Announcement.

On October 19, 1970, the names of three employees were submitted by the Chief, Personnel Branch, GSA, to the Regional Director, TCS, GSA, for consideration for selection to the Communications Specialist, GS-9 position. Individuals listed on this list were: Clarence Brown, Robert Ownbey, and William F. Trost. All of these individuals were rated as "highly qualified" and Mr. Trost (white) was selected for this position by Mr. Joseph Daly, Regional Director, TCS.

Thereafter, on June 15, 1971, the names of three candidates were again referred for selection to the Regional Director, TCS, in connection with a vacancy to a similar position. At this time, the three individuals on the list were: Clarence Brown, Robert Ownbey and John L. Coleman. Candidates Brown and Ownbey were rated as "highly qualified"; Mr. Coleman was rated as "qualified". Mr. Robert Ownbey (white) was selected for this position by Mr. Daly, Regional Director, TCS.

At the time of the first selection, complainant first contacted an EEO Counsellor, alleging discrimination in this selection After counselling, and upon being advised of the imminency of two additional GS-9 vacancies which were purportedly forthcoming in the near future, and for which complainant

allegedly had an "excellent" chance of promotion, complainant decided to discontinue further processing of this complaint. At the time of the second promotion, Mr. Brown again contacted the EEO Counsellor.

Mr. Brown, the complainant, contends that he was better qualified for the position on the basis of his seniority, education, training and supervisory experience. He further contended that Mr. Gallo, as well as Messrs. Daly and Lapolla, with whom Mr. Gallo had consulted in connection with the promotion action, acted in a discriminatory manner in not selecting him for the vacancy. He further contends that although he was advised that his non-selection for the original promotion was based upon his lack of "voice" experience, he has since acquired such experience but that nevertheless Mr. Ownbey received the promotion.

FINDINGS OF FACT AND CONCLUSIONS

The evidence in this case reflects that the selection of Mr. Ownbey for the vacancy of Communications Specialist, GS-9, effective on June 27, 1971, was made by Mr. Joseph A. Daly, Regional Director, Transportation and Communications Service, GSA. As noted above, both Mr. Robert Ownbey and the complainant, Mr. Brown, were rated as "highly qualified" for the position. Under the circumstances, the relative experience, education, and background of both Mr. Ownbey and Mr. Brown are irrelevant to the issues, inasmuch as the rating of "highly qualified" placed these two individuals in the same area of competition for the position.

In an affidavit dated October 18, 1971, Mr. Daly stated that, "After careful consideration of these candidates' qualifications and through discussion with appropriate supervisory

personnel, I then selected Mr. Robert Ownbey for the position, who, in my judgment, was the best qualified."

In support of his decision, Mr. Daly further stated in this affidavit that in his opinion the GS-9 position was one on a career ladder leading to further supervisory positions and that, accordingly, an employee's cooperation and willingness to accept responsibility were necessary prerequisites for the position. In this respect, Mr. Daly noted that the candidates' supervisors, Messrs. Albert J. Gallo, Frank A. Lapolla, and Benjamin Bartnik, unanimously recommended Mr. Ownbey; that Mr. Gallo termed Mr. Brown "uncooperative"; and that this opinion was concurred in by Messrs. Lapolla and Bartnik. In his affidavit, Mr. Daly noted as an example of Mr. Brown's alleged lack of cooperation an instance when the latter had been requested by Mr. Gallo to perform a management survey of the Federal Telecommunications Record Center, but had refused because he thought that Mr. Gallo had made this request as a favor.

In an affidavit dated October 29, 1971, Mr. Albert Gallo, Chief, Communications Division, stated that he and other Communications Division supervisory personnel had unanimously recommended Mr. Robert Ownbey for the position in question. He stated that his own knowledge was based upon his contacts with both men on a day-to-day basis, over a period of years, noting further that Mr. Ownbey had always displayed complete cooperation and willingness to accept responsibility, whereas Mr. Brown, on occasion, would offer some excuse or refuse assignments. As one example, Mr. Gallo cited an instance when Mr. Brown refused to drive the Regional Administrator on grounds that he was too busy; and he cited a further instance where

Mr. Brown refused an assignment to conduct a management survey of the Record Center. Mr. Gallo also stated that there were instances where he had received complaints from Mr. Fred Mandato concerning Mr. Brown's attitude and availability for certain work in respect to data processing, for which he was responsible.

In an affidavit dated October 22, 1971, Mr. Frank A. Lapolla stated that he also had recommended Mr. Ownbey over Mr. Brown, based upon his own observations, as well as comments concerning Mr. Brown's attitude received from Mr. Gallo and Mr. Bartnik. Mr. Lapolla noted complaints received by him from a Mr. Festa in the ADP Unit, complaining about Mr. Brown's indifference and nonresponsiveness to calls from that Unit. Mr. Lapolla also stated that he was aware that Mr. Bartnik had had several talks with Mr. Brown concerning attitude and lack of cooperation; as well as the fact that Mr. Brown had refused an assignment from Mr. Gallo, because he thought that the assignment was being requested as a personal favor.

Mr. Bartnik was not available to give evidence or testimony at any stage of the processing of this case. In fact, it was his leaving to retire which had created the vacancy, serving as a basis for the complaint. The only record information concerning his opinion of the complainant lies in a promotion appraisal, prepared by him on October 14, 1970. On this appraisal, Mr. Bartnik had noted under the factor "Dependability—Present when needed and requires minimum supervision" as "True, most of the time". Under the factor, "Maintains Good Working Relations with Supervisor and Fellow Workers", Mr. Brown was rated as "True, some of the time". Although Mr. Gallo's affi-

davit was included in the report of investigation, as noted above, the latter was not available for personal testimony at the hearing, due to his no longer being employed by the agency. Similarly, John Festa, who reportedly had complained concerning appellant's work performance was no longer employed as well.

While the absence of these witnesses would conceivably deprive the complainant, Mr. Brown, of an ability to cross-examine them, Mr. Brown made no request for their appearance at the hearing. Significantly, we note from Mr. Brown's own testimony at the hearing a corroboration of the fact that Mr. Gallo had approached him for the purpose of performing a management study, and that he had declined to do so. While Mr. Brown contends that this was not a refusal of a direct order and that he should not be disciplined for such a refusal, it should be noted that the issue in question in this case is not whether the refusal requires appropriate disciplinary action, but whether it is an indication of lack of cooperation. It is the opinion of this Examiner that the incident in question could reasonably be interpreted as a lack of the type of cooperation to be desired of an employee being considered for promotion to the position in question.

During the hearing, it was amply demonstrated that the incident involving complainant's failure to drive the Regional Director, when requested to do so, despite the fact that he was on a roster maintained by the agency for that purpose, and was in line for the next assignment, had occurred subsequent to the promotion. Accordingly, such a matter should not have been considered in effecting the promotion action, and we note nowhere in the record that this was done.

The other instance of complainant's failure to fully cooperate lay in his relationships between ADP Personnel in the transmission and receiving of certain information, for which he had responsibilities. Corroboration of this matter was received in the testimony of Mr. Fred Mandato, during the hearing. Although Mr. Mandato could not personally attribute these problems to the complainant, he did testify that he had received complaints concerning complainant from his subordinates, as well as to the fact that there were problems arising between his office and the Division in which Mr. Brown was employed. Taken together with other evidence in this case, there appears sufficient basis to conclude that not only did these complaints exist, but that Mr. Brown was responsible to some degree. Under the circumstances, we find that the evidence contains ample basis for the opinion of complainant's supervisors that he was not *fully* cooperative.

Inasmuch as the manner, extent, and degree of an employee's cooperation is a reasonable factor which could be considered by a selecting officer when attempting to choose between two otherwise equally-qualified individuals, it is the opinion of this Examiner that the basis for Mr. Brown's non-selection lay in his lack of full cooperation, and was not due to discrimination because of his race.

In reviewing the pattern of employment practices within the Transportation and Communication Service as of November 1971, the record reflects that of a total of 269 employees, 76 or 28% were minority group employees and that 62 or 23% of the total were black employees. Moreover, in the Communications Division of the Transportation and Communication Service, there were a total of 78 persons employed, of whom 32, or 42%, were black em-

Exhibit 4 Annexed to Affidavit of Horst Mueller

ployees. Moreover, during the period between 1969 and 1971, the Region 2 Communications Division had a total of 14 promotions, of which 5, or 35% were given to black employees. The Communications Division has a total of 14 employees at the GS-9 level, of which 3, or 21%, were black employees.

RECOMMENDED DECISION

It is recommended that a decision be issued reflecting that the complainant, Mr. Clarence Brown, was not discriminated against on account of his race when he was nonselected for promotion to the position of Communications Assistant, GS-9. It is the opinion of this Examiner that the evidence does not support the complaint in this case.

RECOMMENDED CORRECTIVE ACTION

None.

Respectfully submitted

/s/ JOHN E. SELBMANN
John E. Selbmann
Equal Employment Opportunity
Complaints Examiner

NY:EEO:JES:dmh
Feb 9 1973

Exhibit 5 Annexed to Affidavit of Horst Mueller

(Letter to Clarence Brown dated March 23, 1973)

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
MAR 23 1973
Mr. Clarence Brown
468 Ralph Street
Somerset, NJ 08873

Dear Mr. Brown:

Pursuant to Chapter 4-9 of ADM P 1090.7, GSA Equal Employment Opportunity Program, I am prepared to render the final agency decision on the complaint of Mr. Clarence Brown of racial discrimination.

The investigative file, hearing transcript, and the complaints examiner's recommended decision have been thoroughly analyzed.

Therefore, based upon my findings, I am rendering the final agency decision on the complaint as follows:

That the evidence in the case does not support the complaint of racial discrimination for promotion against you, but that you should receive career and performance counseling from your immediate supervisor to help you formulate plans to receive appropriate training and to correct your deficiencies as noted by management.

If this decision does not meet with your satisfaction, you may file an appeal in writing, either in person or by mail, with the Board of Appeals and Review, U.S. Civil Service Commission, Washington, DC 20415. The Board's decision is the final administrative appeal. This appeal must be filed within 15 calendar days of receipt of this letter.

Exhibit 5 Annexed to Affidavit of Horst Mueller

If you choose to appeal to the Board of Appeals and Review, you retain the right to file a civil action in Federal district court within 30 calendar days after receipt of the Board's final decision on your appeal. You also have the right to file a civil action in Federal district court within 30 calendar days of receipt of this letter or 180 days after filing an appeal with the Board of Appeals and Review if no decision has been made.

Copies of the hearing transcript and the findings and recommended decision of the complaints examiner are enclosed for your information and review.

Sincerely,

(Signed) E. E. Mitchell

E. E. MITCHELL
Director of Civil Rights

Enclosures

cc:
Official File—ARE 2A
Reading File—ARE 2ARE

ARE/RBrown/mbs 3/13/73

Concur:

ARE .....

AR(EX-O) .....

B .....

LR .....

Exhibit 6 Annexed to Affidavit of Horst Mueller

(Receipt for Certified Mail)

Clarence Brown

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S). POSTAGE AND FEE(S) PAID.

☐ Show to whom, date and address where delivered

☒ Deliver ONLY to addressee

RECEIPT

MAR 23 1973

Received the numbered article described below.

REGISTERED NO.

SIGNATURE OR NAME OF ADDRESSEE (*Must always be filled in*)

Clarence Brown

CERTIFIED NO.

1195111

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

INSURED NO.

DATE DELIVERED

3/22/73

DATE WHERE DELIVERED (*only if requested*)

POSTAGE AND FEES PAID
CIVIL SERVICE

POSTMARK OF DELIVERING OFFICE

MAR 23 1973

Print your name and address below. If you want to restrict delivery, or to have the article delivered shown on this receipt, check blocks on other side. Mailing permit and any check that may be tied to article.

RETURN TO

Mr. Joseph W. Daniels
Dep. Director of Civil Rights (EEO) (ARE)
General Services Administration
18th & F Sts., N.W., Room 4103
Washington, DC 20405

PS Form 3811 Jan. 1970 *U.S.G.P.O. 1970-O-418-811*

EXH. 6

RECEIVED
MAY 18 1973

BEST COPY AVAILABLE

Affidavit of Mailing

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss

Pauline Troia being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 27th day of July, 1973, she served a copy of the within govt's notice of motion and memo of law by placing the same in a properly franked envelope addressed to: Greenup and Miller, Esqs., 200 West 135th St. Suite 218 NY NY 10030. And deponent further says that she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

PAULINE TROIA

Sworn to before me this
27th day of July, 1973

/s/ WALTER G. GRANNON
WALTER G. GRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975

• • •

MEMO ENDORSED

• • •

Affidavit of Mailing

September 26, 1973

See memorandum decision of this date granting the within motion.

LLOYD F. MACMAHON
U.S.D.J.

U. S. DISTRICT COURT
FILED
SEP 27 1973
S. D. OF N. Y.

Motion for Leave to File an Amended Complaint and to Add Parties

(Title omitted in printing)

Comes now plaintiff by and through counsel Jeff L. Greenup, and moves this Court for leave to file an amended complaint in this matter pursuant to Rule 15(a) of the Federal Rules of Civil Procedure and as grounds therefor states as follows:

1. That the time for filing an amended complaint as of right has run and that the amended complaint can be filed now only with leave of court.

2. The original complaint contains a factual error, to wit: that the plaintiff has been fired, rather, plaintiff has only been refused promotion, which factual error we seek to correct.

3. The original complaint though setting out a claim in the body of said document against Mr. John E. Selbman, Complaint Examiner, United States Civil Service Commission, and the United States Civil Service Commission, due to typographical oversight, failed to list said defendants in the caption of the complaint. The claim against Mr. Selbman and the Commission is quite substantial and should be litigated as part of the instant case.

4. Though plaintiff feels that his jurisdictional statement is clear, the government intimates that the claim under 28 U.S. 1346(a) and (b), 1343(4) and the $10,000 jurisdictional amount for 28 U.S.C. 1331 is not explicit enough. The plaintiff seeks to make the above so explicit in an amended complaint.

Motion for Leave to File an Amended Complaint and to Add Parties

For the foregoing reasons plaintiff prays this Court for leave to file the amended complaint hereto attached and to add parties.

GREENUP AND MILLER
Attorneys for Plaintiff
200 West 135th Street
Suite 218
New York, New York 10030
By: JEFF L. GREENUP
Jeff L. Greenup

Dated: September 15, 1973.

CERTIFICATE OF SERVICE

I hereby certify that copies of foregoing motion and the attached amended Complaint have been mailed postage prepaid, addressed as follows:

Joel B. Harris
Assistant United States Attorney
United States District Court
Southern District
Foley Square
New York, New York 10007

Dated:

/s/ JEFF L. GREENUP
JEFF L. GREENUP

Amended Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2026 (LPM)

Clarence Brown,

Plaintiff,

—against—

General Services Administration, United States of America, Transportation and Communications Service, Communications Division, Region 2, Joseph A. Daly, Regional Director, Transportation and Communications Service, Albert Gallo, Chief, Communications Division, Frank A. Lapolla, Acting Chief, Communications Division, Transportation and Communications Service, Region 2, and John E. Selbman, Complaint Examiner, United States Civil Service Commission, and the United States Civil Service Commission,

Defendants.

Count I

Jurisdiction of this Court is invoked pursuant to Title VII of the Civil Rights Act of 1964; 28 U.S. Code, Sections 1331, 1343(4), 1346(a) and (b) and the Equal Employment Opportunity Act of 1972 (hereinafter sometimes referred to as "The 1972 Act"), with particular reference to Section 717 of the 1972 Act, covering discrimination in federal employment. Jurisdiction is specifically enlarged by the said 1972 Act and conferred upon this Court by 42 U. S.

Code Section 2000e-5(g) and 28 U.S. Code Sections 2201 and 2202. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by (a) 42 U.S. Code Sections 2000e et seq., providing for injunctive and other relief against racial discrimination in employment and (b) 42 U.S. Code Section 1981, providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States. There is more than $10,000 in controversy.

Count II

Plaintiff is a citizen of the United States and resides at 468 Ralph Street, Franklin Township, Somerset, New Jersey. He is a Negro, or black.

(b) The defendants have their place of business at 26 Federal Plaza, in the City, County and State of New York, known as Region 2 of the General Services Administration of the United States Government.

(c) Plaintiff was employed in the title and grade of Communications Specialist, GS 7, under the immediate supervision of the defendant, Albert Gallo, Chief, Communications Division, Transportation and Communications Service, Region 2.

Count III

Nature of Proceeding:

This is a proceeding alleging racial discrimination by the defendants Joseph A. Daly, Albert Gallo and Frank A. Lapolla, as the plaintiff's superiors at Region 2 of the General Services Administration. The General Services Administration has been joined as a party defendant be-

cause it tolerated the alleged racial discrimination to exist and to continue to exist, despite the complaints of the plaintiff hereinafter referred to and described. John E. Selbman of the United States Civil Service Commission and the Commission have been joined as party defendants because, in entertaining and ruling upon the plaintiff's complaint of racial discrimination, they acted in an arbitrary and capricious manner by failing to make the in-depth inquiry into the alleged racial discrimination as, under the said Civil Rights Act of 1964 and the Act as amended in 1972, they were required to do. It will not be claimed that the alleged racial discrimination was against Negro employees as a class, but only that it was improperly, unlawfully and illegally exercised against the plaintiff, as a black man with individualistic and distinctive qualities which the defendants found offensive only because the plaintiff is a Negro and black and because such individualistic qualities did not fit the stereotypical qualities which the defendants, who are white, expected in a black man and an American citizen. It is further contended that the conduct of the individual defendants discriminated against the plaintiff racially and in ways which deprived the plaintiff of equal employment opportunities and otherwise adversely affected plaintiff's former status as an employee of the General Services Administration, by delimiting and preventing his promotion in said employment, despite the plaintiff's merit qualifications and his seniority as an employee of the said Governmental agency for upwards of fifteen years.

Plaintiff claims that his denial of promotion was retaliatory in nature and based primarily upon his race and color and attitude of distinctive manliness which in no way detracted from the superior merit of his work.

Count IV

NATURE OF RACIAL DISCRIMINATION:

The particular nature of the racial discrimination here claimed, all to the detriment, deprivation and loss of the plaintiff's civil rights, is that the plaintiff was deprived of merited and earned promotion by the following several circumstances, to wit:

(a) The individual defendants, acting for and in the Communications Division of the Transportation and Communications Service, entered into secret and illegal agreements in and among themselves, to establish a promotional system especially geared to the plaintiff, with the design, intent and purpose which is to continue and preserve, and which has the effect of continuing and preserving an illegal, improper, arbitrary and capricious policy, practice, custom and usage, against the plaintiff of limiting, cutting off, annulling and destroying the promotional opportunity of the plaintiff solely on the basis of his race and color. Those discriminatory policies and practices are described as follows:

(i) In June, 1971, plaintiff, although well qualified and with seniority, was not selected for promotion to the title of GS-9. It is alleged that he was deliberately passed over. At that time, the asserted reason for his non-promotion was that there was a "voice" deficiency, that is, that the plaintiff lacked "voice experience." After plaintiff filed an administrative complaint because of his non-selection for promotion in 1971, he was duped and tricked into believing that "lack of voice experience" was the true, real and genuine reason for his non-selection by the defendant Gallo, and plaintiff discontinued his complaint.

(ii) Thereafter, plaintiff acquired full voice experience and when another opening for the title GS-9 arose, plaintiff applied for said promotion, again, on the basis of his qualifications, his seniority and his acquisition of voice experience. Again, the plaintiff was passed over, with the alleged excuse, reason or subterfuge being given that plaintiff had not been "cooperative" on an occasion wholly unrelated to any performance of his job title or the title of GS-9, which said reason was not a true and genuine reason, but which was advanced and given to cloak and obscure a prohibited discrimination against the plaintiff based solely upon his race and color.

(iii) In June, 1971, when the plaintiff was passed over, or denied the sought promotion to GS-9, the "reason" spuriously advanced at that time was the alleged lack of "voice experience." Nothing was then mentioned about any alleged refusal to perform any assignment although the alleged "failure" to perform was said to have occurred in March, 1971, well before the said June 1971 incident of being "passed over."

(iv) The circumstances of the "passing over," as stated by the defendants, was but a sham, a pretense and a fraud to cover up the racial discrimination then being exerted and practiced against the plaintiff because of the plaintiff's race and color.

(b) Subsequently and by reason of the sham and fraud practiced against the plaintiff, he agreed to undertake further training, having acceptd in good faith the representations of the defendants concerning his experience; he acquired the said experience theretofore alleged to be absent; he acquired further qualifications, including special

educational courses taken at his own expense and upon his own time; the said circumstances, coupled with his long enduring seniority, gave him superior qualifications for promotion to the next vacancy for the title of GS-9.

(c) When said vacancy did in fact occur in 1972, plaintiff was described as "qualified," by reason of the excellence of his professional background and record.

(d) Despite plaintiff's qualifications, a white colleague, with less qualifications and less seniority, was appointed to the vacancy, the title of which the plaintiff had been considered for in 1971 and for which the plaintiff had been induced by lies and racial discrimination to aspire to in the said 1972.

(e) Defendant was "passed over" a second time in 1972, for the false, invented, concocted and pretended "reason" that he lacked certain qualities of cooperativeness and had refused to do certain work when ordered by a superior to do said work. The said sham, pretense and invention advanced as a false reason for disqualifying the plaintiff for the said promotion, was merely the convenient cover-up and camouflage for the wrongful, illegal and improper racial discrimination brought to bear against the plaintiff. In fact and in truth, the genuine and real reason for the plaintiff's failure to be promoted was the sum of the acts of racial discrimination against the plaintiff, all of which are prohibited by the Civil Rights Act of 1964 and the 1972 amendments to said Act and the Civil Rights Act of 1866.

(f) Upon information and belief, the defendants, in their relationships with the plaintiff, invoked antiquarian standards on which approval of the plaintiff would be based; in general, and specifically, with respect to the plaintiff,

the defendants regarded members of the Negro race as inferior and expected from Negroes, a fawning, humble and self-effacing attitude, exhibiting gratitude and cowering timidity in the presence of whites in a superior job position. The plaintiff, on the other hand, is a black citizen who exhibits pride in himself, pride in his abilities, his background and his extensive education and job skills. The defendants construed this attitude to be one of hostile arrogance, instead of pride and the said defendants resented such attitude on plaintiff's part and agreed among themselves to penalize the plaintiff because he possessed racial attitudes and characteristics of individuality and personality which disagreed with defendants' stereotyped attitudes and expectations and the said defendants did in fact and in truth penalize the plaintiff and said penalties of discrimination and preference for others who were less qualified than plaintiff and members of the white race, all to the sore abuse and breach of the said Civil Rights Act of 1964 and the 1972 Amendments thereto, and the Civil Rights Act of 1866, and all to plaintiff's harm, deprivation and proscribed loss and detriment.

(g) In consequence of said conduct, attitude and illegal discrimination on the part of the defendants, acting both together and singly, the plaintiff's career with the United States Government has been forever ruined, after over fifteen years of loyal and skillful service to the United States of America in positions of trust and fidelity, including the loss of opportunities to be advanced on merit in his career of Federal employment. Plaintiff has been further so diminished in his morale that he has been compelled to seek redress of the grievous wrongs done to him and his career by resorting to litigation in this Court, all

of which places a heavy burden upon him and his meager resources and his diminished estate.

(h) The plaintiff's wrongful discharge, occasioned by the wrongdoing and breach of Federal statute as alleged herein, was occasioned by said wrongful and racially discriminatory acts of the defendants and not by reason of any fault or lack on the part of the plaintiff.

Count V

THE ACTS OF THE CIVIL SERVICE COMMISSION:

The particular acts of the United States Civil Service Commission which warrant the relief hereinafter requested and prayed for by the plaintiff, are as follows:

(a) Following the prohibited racial discrimination against the plaintiff in his employment as aforesaid, the plaintiff, pursuant to rules and regulations relating to employee complaints, filed a formal complaint with the General Services Administration, alleging a wrongful racial discrimination against him connected with his employment.

(b) A hearing was held in due course upon such complaint and after the completion thereof, the hearing officer made his findings and recommendations, claiming that there was no racial discrimination, but that the plaintiff had failed to be promoted to GS-9 because of his attitude and not because of any racial discrimination against him.

(c) This finding was an arbitrary and capricious determination and not based upon truth and the facts in dispute and was and is illegal and improper in the following respects, to wit:

(i) The determination arrived at after the said hearing, was a conclusion which had been decided upon prior to the said hearing.

(ii) The said hearing was but a sham and a fraud convened to simulate propriety and allegiance to the law when, in fact, the conclusion had been predetermined and the said hearing was but a form to cloak a decision arrived at prior thereto.

(iii) The hearing officer was not sensitive to the subtle nuances of racial discrimination and the manifold indirect ways of a white society to penalize an individualistic and distinctive Negro.

(iv) The hearing officer accepted as truth and gave probitive value to the rankest kind of hearsay, gossip and untruth in reaching his conclusion, in the absence of sworn testimony to support an otherwise naked conclusion, especially with respect to a witness, Fred Mandato, who testified that certain "incidents" were brought to his attention, concerning the plaintiff; that other "individuals" had mentioned the plaintiff to him critically; that he was "told" that plaintiff had gone to lunch, instead of completing certain work, although he confessed that he had no knowledge of what the plaintiff's superior may have instructed or told plaintiff. Such accumulations of hearsay and gossip in the record were, in sum, a sinister totality, adding to the improper discrimination against the plaintiff and added up to the arbitrariness and capriciousness of the hearing officer in reaching his prohibited determination concerning the plaintiff's complaints. The said hearing officer further allowed in the record and considered against the plaintiff various matters of alleged complaint which occurred long after the critical periods

under consideration, all to the arbitrary and capricious prejudice against the plaintiff. The hearing officer also accepted against the plaintiff, testimony claiming improprieties on the part of the plaintiff, even though there had never been any complaint after such alleged improprieties and nothing appeared in plaintiff's personnel folder relating to such matters, all of which was prejudicial, wrongful, improper, capricious and arbitrary.

(v) The hearing officer employed standards by which he judged the plaintiff which were so subjective as to be vague and improper, such as the claim that the plaintiff had no close friends in his employment, which bore no objective relationship to the plaintiff's abilities and professional competence whatsoever.

Count VI

PLAINTIFF'S ADMINISTRATIVE COMPLAINT:

Within ninety days of the occurrence of the claimed racial discrimination against the plaintiff as herein set forth, plaintiff filed his written charges under oath, alleging a breach of the Equal Employment Opportunity Act and his rights under Title VII of the Civil Rights Act of 1964, and the Civil Rights Act of 1866.

Under date of December 13, 1972, the said Mr. Selbman of the Civil Service Commission held a hearing on the plaintiff's administrative complaint and, under date of February 9, 1973, the said hearing officer rendered his decision and determination finding that the evidence did not support plaintiff's allegations of racial discrimination and he recommended no corrective action in plaintiff's behalf.

For all of the reasons set forth in Count IV and the preceding Counts of the complaint herein, it is claimed by the plaintiff that the handling of his complaint, the hearing and the determination reached by the hearing officer, were all arbitrary, capricious, illegal and improper and in violation of the spirit, the letter and the remedial intention of the Civil Rights Act of 1964 and the 1972 amendments to the said Act, and the Civil Rights Act of 1866, all to the plaintiff's deprivation of due process and the protections intended and mandated by the said Civil Rights Acts and the plaintiff's employment rights.

Following the receipt by the plaintiff of the advice that his complaint had been dismissed administratively, and within the time permitted by statute, allowing him to institute a civil action for redress of his grievances, the plaintiff has commenced this said civil action.

Although both the City and State of New York have bureaus and departments administering human rights agencies to bar job discrimination, upon information and belief, the Civil Rights Act of 1964 and the 1972 amendment of the act, and the 1866 Act, pre-empt the field with respect to complaints of racial discrimination in federal employment and jurisdiction as heretofore alleged, is conferred upon this Court by federal statute. Furthermore, there is no adequate non-federal remedy. A copy of plaintiff's administrative complaint is annexed hereto as an exhibit and made a part of this complaint.

Count VII

If the relief hereinafter prayed for is not granted, the plaintiff will be irreparably denied rights secured to him by the Civil Rights Act of 1964 and the 1972 amendment

thereof, and the Civil Rights Act of 1866, and he has sustained damages in excess of $10,000.

Plaintiff has no adequate remedy at law to redress the wrongs described above.

WHEREFORE, plaintiff prays as follows: That this Court grant such relief as may be appropriate, including injunctive orders, damages, costs, attorney's fees and back pay.

.....

Plaintiff's Signature

GREENUP and MILLER
Attorneys for Plaintiff
277 Broadway
New York, N.Y. 10007
Tel.: 666-8880

By: .....
A Member of the Firm

Dated:

September 15, 1973.

Order Denying Application to Amend Complaint and Add Parties

September 26, 1973

The within application to amend the complaint and add parties is denied because this action has been dismissed for want of subject matter jurisdiction, and the proposed amended complaint does not change the situation. See memorandum decision of this date granting defendants' motion to dismiss the complaint.

So ordered.

LLOYD F. MACMAHON
U.S.D.J.

U.S. DISTRICT COURT
S. D. OF N. Y.
FILED
Sept. 27, 1973
Paul J. Curran
COPY RECEIVED
September 18, 1973
UNITED STATES ATTORNEY

Judgment Ordering Dismissal

73 Civil 2026 (LFM)

U.S. DISTRICT COURT
FILED
Sep 28 1973
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLARENCE BROWN,
Plaintiff,

—against—

GENERAL SERVICES ADMINISTRATION, UNITED STATES OF AMERICA, TRANSPORTATION AND COMMUNICATIONS SERVICE COMMUNICATIONS DIVISION, REGION 2, JOSEPH A. DALY, REGIONAL DIRECTOR, TRANSPORTATION AND COMMUNICATIONS SERVICE, ALBERT GALLO, CHIEF, COMMUNICATIONS DIVISION, AND FRANK A. LAPOLLA, ACTING CHIEF, COMMUNICATIONS DIVISION, TRANSPORTATION AND COMMUNICATIONS SERVICE, REGION 2,
Defendants.

Defendants having moved the Court to dismiss the complaint for lack of subject matter jurisdiction, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, and the said motion having come on to be heard before the Honorable Lloyd F. MacMahon, United States District Judge, and the Court thereafter on September 27, 1973, having handed down its memorandum decision granting the said motion, it is,

Judgment Ordering Dismissal

ORDERED, ADJUDGED AND DECREED, that defendants, General Services Administration, United States of America, Transportation and Communications Service Communications Division, Region 2, Joseph A. Daly, Regional Director, Transportation and Communications Service, Albert Gallo, Chief, Communications Division, and Frank A. Lapolla, Acting Chief, Communications Division, Transportation and Communications Service, Region 2, have judgment against the plaintiff, Clarence Brown, dismissing the complaint.

Dated: New York, N.Y.
September 28, 1973

/s/ RAYMOND F. BURGHARDT
Clerk

Notice of Appeal

(Title omitted in printing)

Notice is hereby given that Clarence Brown, plaintiff in the above styled matter hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 28th day of September, 1973, dismissing plaintiff's complaint for lack of subject matter jurisdiction.

Dated: Oct. 22, 1973

GREENUP AND MILLER
200 West 135 Street
Suite 218
New York, New York 10030
By: JEFF L. GREENUP
JEFF L. GREENUP

JACK GREENBERG
WILLIAM ROBINSON
JOHNNY J. BUTLER
10 Columbus Circle,
Suite 2030
New York, New York 10019
(212) 586-8397

Attorneys for Plaintiff.

Certificate of Service

I hereby certify that a copy of this Notice of Appeal was mailed, postage prepaid, addressed as follows:

Paul J. Curran, Esq.
United States Attorney
Southern District of New York

Joel B. Harris, Esq.
Assistant U.S. Attorney

United States Court House
Foley Square

New York, New York 10007
Dated: Oct. 23, 1973

By: .....

Order Allowing Certiorari

SUPREME COURT OF THE UNITED STATES

No. 74-768

CLARENCE BROWN,

Petitioner,

v.

GENERAL SERVICES ADMINISTRATION, et al.

ORDER ALLOWING CERTIORARI. Filed May 27, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second ..... Circuit is granted.

Mr. Justice Douglas and Mr. Justice Marshall took no part in the consideration or decision of this petition.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-768

CLARENCE BROWN, PETITIONER

v.

GENERAL SERVICES ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1a) is not reported. The opinion of the court of appeals (Pet. App. 2a-18a) is reported at 507 F.2d 1300.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1974. The petition for a writ of certiorari was filed on December 20, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's complaint was properly dismissed for failure to exhaust administrative remedies.

STATEMENT

Petitioner, a black employee of the General Services Administration, filed an administrative complaint on July 15, 1971, alleging that he had been denied a promotion on the basis of race. After preparation and review of an investigative report, a Regional Administrator notified petitioner that there was no evidence of racial discrimination. Petitioner requested a hearing before a complaints examiner of the Civil Service Commission. The examiner, however, found no evidence of discrimination and recommended that no action be taken on the basis of petitioner's complaint.

On March 23, 1973, the General Services Administration issued its final decision determining that the evidence did not support petitioner's complaint of racial discrimination. On March 26, 1973, petitioner received written notification of that decision, together with a copy of the transcript of the hearing and the findings and recommended decision of the complaints examiner. The letter of notification advised petitioner that he could appeal the decision to the Civil Service Commission or challenge it by commencing an action in federal district court within 30 days of receipt of the letter under Section 717(c) of the Civil Rights Act of 1964, as added, 86 Stat. 112, 42 U.S.C. (Supp. III) 2000e-16(c).

Petitioner did not appeal to the Civil Service Commission and did not commence an action in federal district court within 30 days (Pet. 5; Pet. App. 6a).

On May 7, 1973—42 days after he received notice of GSA's final decision—petitioner filed a complaint in the district court seeking "such relief as may be appropriate, including injunctive orders, damages, costs, attorney's fees and back pay" (Pet. App. 6a). The district court's jurisdiction was alleged to be invoked under Title VII of

the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, 28 U.S.C. 1331 (federal question), the Equal Employment Opportunity Act of 1972 "with particular reference to §717 of the 1972 Act, covering discrimination in federal employment" (Complaint, p. 1), the Declaratory Judgment Act, 28 U.S.C. 2201, *et seq.*, and 42 U.S.C. 1981 (Pet. App. 6a).[1]

Respondents moved to dismiss the complaint for lack of subject matter jurisdiction, on the ground that petitioner had not filed his complaint within 30 days of receipt of notice of the agency's final decision, as required by Section 717(c) (Pet. App. 7a). The district court granted the motion to dismiss (Pet. App. 1a).

The court of appeals affirmed. It held first that Congress intended Section 717(c) to be the exclusive judicial remedy for federal employee discrimination grievances. This remedy, the court held, is retroactively available to any federal employee, such as petitioner, whose administrative complaint was pending at the time Section 717(c) became effective on March 24, 1972. Petitioner's complaint, however, was untimely under Section 717(c) and therefore was properly dismissed (Pet. App. 11a-15a). The court stated (Pet. App. 13a; footnote omitted):

> We hold that there is no "manifest injustice" in the retroactive application of the statute to Brown's complaint. Twice he was notified in letters from the GSA of the procedure for obtaining court review of the agency decision. Both letters gave notice of the 30 day filing requirement. His counsel have not suggested any excuse for the delay in filing the complaint—either in their briefs, or in oral argument,

---

[1]Petitioner's motion to amend his complaint by alleging additional bases of jurisdiction under 28 U.S.C. 1343(4) and the Tucker Act, 28 U.S.C. 1346(a)(2), and by adding an allegation that more than $10,000 was in controversy, was denied by the district court (Pet. App. 7a). The court of appeals did not review the denial of this motion, and petitioner does not seek review of the denial in this Court (Pet. 2).

particularly in response to a direct question by the Court concerning such delay. Instead, his counsel argue that the statute does not apply because Brown has not complied with it. In a sense, he is correct in that he cannot take advantage of the statute because he has not complied with its terms. This failure is fatal to Brown's claim, since we hold below that Congress intended Section 717(c) to be the exclusive judicial remedy for federal employee discrimination grievances.

Alternatively, the court held that even if Section 717(c) were not the exclusive remedy and petitioner were not bound by the 30-day filing requirement, the complaint was properly dismissed because petitioner inexcusably failed to exhaust his administrative remedies by appealing GSA's final decision to the Civil Service Commission, as provided by 5 C.F.R. 713.231 (Pet. App. 16a-17a). The court stated (*ibid.*):

For aught that appears in the record before us, we cannot say that an appeal to the CSC might not have resulted in granting the relief sought by Brown. * * *

Moreover, it cannot be said here that the administrative remedies available to Brown were inadequate or futile. * * * Administrative regulations in effect at the time Brown filed his complaint in the district court (and which remain in effect) provided for retroactive promotion with back pay if discrimination was found. 5 C.F.R. §713.271(b) (1974), 37 Fed. Reg. 22,717 (1972). This essentially is the relief sought in his federal court action. Nor does Brown claim that he had no notice of the appellate relief available (he received two letters so informing him), or that his attempts to seek administrative remedies were frustrated. * * *

Under the circumstances of this case, we hold that Brown inexcusably failed to exhaust available administrative remedies.

ARGUMENT

Petitioner does not contend that his complaint was timely filed under Section 717(c) or that the Section should not have been given retroactive application to his claim. He argues instead (Pet. 7-13) that the right of action created by Section 717(c) is not exclusive and that a federal employee alleging employment discrimination has available "a variety of overlapping [judicial] remedies" (Pet. 7). Although the court of appeals rejected that contention, this Court need not consider the issue in this case. Even if those "overlapping" judicial remedies might otherwise be available to a federal employee, petitioner is in no position to invoke them because he failed to exhaust his administrative remedies.

The Civil Service Commission's regulations governing equal employment opportunity, 5 C.F.R. Part 713, provide that a complainant who is not satisfied with the final decision of his employing agency may appeal that decision to the Commission. 5 C.F.R. 713.231-713.236. The Commission's Board of Appeals and Review must review the complaint filed and "issue a written decision setting forth its reasons for the decision" (5 C.F.R. 713.234). If it finds that the complainant was discriminated against and was denied an employment benefit as a result of the discrimination, the Commission is empowered to grant broad remedial relief, including retroactive promotion with back pay. 5 C.F.R. 713.271(b).

Petitioner's failure to appeal to the Civil Service Commission is fatal to his complaint in this case. There is no justification for petitioner's "premature interruption of the administrative process" (*McKart* v. *United States*, 395

U.S. 185, 193), a process that could have culminated in an agency order granting him the basic relief he sought in the district court. "[P]ractical notions of judicial efficiency" and "administrative autonomy" (*id.* at 195) preclude resort to the courts until such administrative remedies are exhausted.

It is true that Section 717(c) relaxes the usual exhaustion requirement to the extent of permitting a federal employee to bring a civil action within 30 days after he receives notice of his employing agency's final decision, without requiring him to pursue an appeal to the Civil Service Commission. But that provision does not reflect a general congressional policy that "it would be unfair to require [federal] employees to file an appeal with the Board of Appeals and Review" (Pet. 17). Section 717(c) is narrowly tailored to excuse normal exhaustion requirements if, *but only if*, the employee brings a civil action within 30 days.

In terms, Section 717(c) authorizes suit only under Section 706 of the 1964 Act (see Pet. 3). Petitioner's argument is premised on the contentions that that authorization did not supplant alternative pre-existing remedies and that the timely filing of a suit under Section 717(c) also serves to eliminate the need for further exhaustion of administrative remedies before those alternative grounds for relief can be asserted in the courts. But even if petitioner is correct in those contentions, there is no basis for his necessary further contention that a failure to comply with Section 717(c) somehow also serves to excuse petitioner from complying with normal exhaustion of administrative remedies requirements before seeking relief in the courts under other statutes that do not, like Section 717(c), include any modification of the normal exhaustion requirements.

Since petitioner neither brought his action within the 30-day period prescribed by Section 717(c) nor filed an appeal with the Civil Service Commission, his complaint was properly dismissed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

ROBERT E. KOPP,
NEIL H. KOSLOWE,
Attorneys.

APRIL 1975.

Supreme Court, U. S.
FILED
APR 8 1975
MICHAEL RODAK, JR., CLERK

IN THE

United States Supreme Court

OCTOBER TERM, 1974

No. 74-768

CLARENCE BROWN,

Petitioner,

v.

GENERAL SERVICES ADMINISTRATION, *et al.*

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
BARRY L. GOLDSTEIN
ERIC SCHNAPPER
10 Columbus Circle
New York, New York 10019

JEFF GREENUP
200 West 135th Street
New York, New York 10030
Counsel for Petitioner

IN THE

United States Supreme Court

OCTOBER TERM, 1974

No. 74-768

CLARENCE BROWN,

Petitioner,

v.

GENERAL SERVICES ADMINISTRATION, *et al.*

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner Clarence Brown submits this reply memorandum in support of his Petition for a Writ of Certiorari.

The Court of Appeals decided three questions of law, each of substantial significance to the elimination of discrimination in federal employment. The government does not deny the importance of the issues involved; on the contrary, government attorneys throughout the country are giving ample demonstration of that importance by relying on similar arguments, and increasingly on the decision below, to obstruct any remedy for such discrimination in scores of cases.

The first holding of the Court of Appeals was that Congress, in adopting Section 717, tacitly repealed half a dozen other statutes creating federal jurisdiction over claims of federal employment discrimination. Petition, pp. 13a-17a. That holding is in conflict with two decisions of this Court

as well as the decisions of five courts of appeals. Petition, pp. 7-9. The Solicitor General, however, declines to defend or discuss the correctness of this holding.

The second holding of the Court of Appeals was that section 717 applies to acts of discrimination occurring prior to its effective date, March 24, 1972. Petition, pp. 9a-13a. This holding is in conflict with the holdings of one court of appeals and six district courts. See *Place* v. *Weinberger*, No. 74-116. The holding, and the government's argument in the Second Circuit, are in conflict with the government's position in three other circuits and twenty district courts. *Id.* The Solicitor General, however, declines to defend or discuss the correctness of this holding.

The third holding of the Court of Appeals was that a federal employee who exercises his right to sue under section 717 without appeal to the Appeals Review Board automatically loses his right to sue under 42 U.S.C. § 1981 or any other statute. This holding is in conflict with the decisions of two courts of appeals[1] and with the position taken by the government in *Johnson* v. *Railway Express Agency*, No. 73-1543. The Solicitor General, however, declines to defend or discuss the correctness of this holding.

Rather than deal with the actual decision below, the Solicitor General now advances a position never raised before or considered by the District Court or Court of Appeals—that a federal employee who sues after the completion of agency action under section 1981 or any statutes other than section 717 must commence that action within 30 days of final agency action. Brief for Respondents in Opposition, pp. 5-7. This proposal is different from the

[1] *Guerra* v. *Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974); *Macklin* v. *Spector Motor Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973).

holding of the Court of Appeals—which forbade any such suit without an appeal to the Appeal Review Board—and is not supported by the language or legislative history of section 717, section 1981, or any other statute. The proposal, rather, represents an attempt by the government to fashion out of thin air an exhaustion rule hopefully more defensible than that of the Court of Appeals yet still strict enough to win this particular case. The Solicitor General suggests that this new rule, first conceived by government attorneys in April 1975, be applied retroactively to petitioner's actions of March 1973, so as to penalize him for failing to anticipate the exhaustion requirements the government would advance two years later.

The government's new position suffers from the same defects as its earlier position in, and the holding of, the Court of Appeals. Petition, pp. 13-19. Moreover no such exhaustion argument could be resolved in favor of the government on the record of this case. Any contention that a party failed to exhaust his administrative remedies necessarily raises two questions of fact—whether administrative proceedings were already so long as to make further delay unreasonable, and whether there was a reasonable chance that the result of further administrative proceedings would be favorable to the grievant. *Smith* v. *Illinois Bell Telephone Co.*, 270 U.S. 587 (1926), *City Bank Farmers' Trust Co.* v. *Schnader*, 291 U.S. 24 (1934). It is clear that a dispute of fact exists on just these questions. The government urges that the appeal might have resulted in the relief sought.[2] Petitioner maintains that the appeal process is little more than a sham, that the Appeal Review Board upholds the agency decision in at least 98% of all cases, and that the Board has never awarded back pay or pro-

[2] Brief for Respondents In Opposition, p. 6.

motion to a minority employee except where the agency conceded there was discrimination.[3] Petitioner also maintains that further delay was unreasonable in view of the fact that the government had already exceeded by 14 months the deadline for agency decision imposed by Civil Service Commission regulations.[4] This case comes to this Court on a government motion to dismiss for lack of subject matter jurisdiction; in considering such a motion, like a motion for summary judgment, disputes of fact must be resolved against the moving party. In the instant case, moreover, neither court below had an opportunity to consider this dispute of fact—the exhaustion issue was neither raised by the government in the District Court nor briefed by either party in the Court of Appeals. It would clearly be unfair to dismiss the instant complaint, or to deny Certiorari, without granting petitioner a hearing in any court on his contention that on the facts of this case further efforts at exhaustion should not have been required.

Certiorari is singularly appropriate in a case such as this involving three distinct holdings, each creating a conflict among the circuits and each of substantial importance. That is particularly so in view of the fact that the respondents decline to defend the correctness of any of those holdings, and one of the conflicts results directly from the government's advancing inconsistent positions in different circuits. See *Place* v. *Weinberger,* No. 74-116. The appropriateness of granting the writ is in no way lessened because, while government attorneys throughout the country are urging other courts to follow the broad precedents set by the Second Circuit, the Solicitor General opposes Certiorari in this case on the ground that, while those holdings

[3] Petition, p. 15.

[4] Petition, pp. 5, 15.

may well be wrong, the government believes the result might be justifiable on a different and narrower ground never presented to or considered by the courts below.[5]

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
BARRY L. GOLDSTEIN
ERIC SCHNAPPER
10 Columbus Circle
New York, New York 10019

JEFF GREENUP
200 West 135th Street
New York, New York 10030
Counsel for Petitioner

[5] Since the filing of the Petition for Writ of Certiorari, petitioner has been transferred to another government agency. That lateral transfer has no effect on his claim for back pay or for injunctive relief.

Supreme Court, U. S.
FILED
AUG 13 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-768

CLARENCE BROWN,

Petitioner,

v.

GENERAL SERVICES ADMINISTRATION, *et al.*

BRIEF FOR PETITIONER

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
MELVYN R. LEVENTHAL
BARRY L. GOLDSTEIN
BILL LANN LEE
ERIC SCHNAPPER
10 Columbus Circle
New York, New York 10019

JEFF GREENUP
200 West 135th Street
New York, New York 10030

Counsel for Petitioner

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	1
Statutory Provisions Involved	2
Statement of the Case	4
Summary of Argument	7
ARGUMENT	
I. Jurisdiction Over This Action Is Conferred By Statutes Adopted Prior To Section 717 of Title VII of The 1964 Civil Rights Act	11
A. 1. The 1866 Civil Rights Act	14
2. The Mandamus Act	22
3. The Tucker Act	26
4. 28 U.S.C. § 1331	31
5. Administrative Procedure Act	36
B. Application of Section 717 to Discrimination Occurring Before March 24, 1972	38
C. Section 717 Did Not Repeal Pre-Existing Remedies for Discrimination in Federal Employment	38

PAGE

II. This Action Should Not Be Dismissed For Failure To Exhaust Administrative Remedies 44

A. Exhaustion of Administrative Remedies Is Not a Prerequisite To An Action Under The 1866 Civil Rights Act, etc. 45

1. Independent Remedies 46

2. Purposes of Exhaustion 49

3. Other Policy Considerations 56

B. Even If Exhaustion Is Generally Required In Such Actions, It Should Not Be Required In This Case 61

CONCLUSION 67

APPENDIX A 1aa

APPENDIX B 2aa

TABLE OF AUTHORITIES

Cases:

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) ..36, 45
Ableman v. Booth, 21 How. (62 U.S.) 506 (1858) 18
Adams v. Witmer, 271 F.2d 29 (9th Cir. 1959) 37
Albemarle Paper Co. v. Moody, 43 U.S.L.W. 4880 (1975) 25, 49, 50, 55
Alcoa S.S. Co. v. United States, 80 F.Supp. 158 (S.D. N.Y. 1948) 28
Alexander v. Gardner-Denver Co., 415, U.S. 36 (1974) 37, 40, 42, 46, 50, 51, 55, 56, 64
Allison v. United States, 451 F.2d 1035 (Ct. Cl. 1971) 29, 40

PAGE

Arrington v. Massachusetts Bay Transportation Authority, 306 F.Supp. 1355 (D. Mass. 1969) 14
Arrow Meat Company v. Freeman, 261 F.Supp. 622 (D. Ore. 1966) 36
Aycock-Lindsey Corporation v. United States, 171 F.2d 518 (5th Cir. 1948) 29

Beale v. Blount, 461 F.2d 1133 (5th Cir. 1972) 24, 25, 30
Beers v. Federal Security Administrator, 172 F.2d 34 (2nd Cir. 1949) 28
Bennett v. Gravelle, 4 EPD ¶7566 (4th Cir. 1971) 15, 35
Berk v. Laird, 429 F.2d 302 (2d Cir. 1970) 34
Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) 28, 35
Blanc v. United States, 244 F.2d 708 (2d Cir. 1957) 31
Board of Trustees of Arkansas A & M College v. Davis, 396 F.2d 730 (8th Cir. 1968) 35
Bolling v. Sharpe, 347 U.S. 497 (1954) 17, 23, 28, 34, 35
Boudreau v. Baton Rouge Marine Contracting, 437 F.2d 1011 (5th Cir. 1971) 15, 40
Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974) 38
Brady v. Bristol Meyers, Inc., 459 F.2d 621 (8th Cir. 1972) 15, 40
Brooks v. Marcelli, 331 F.Supp. 1350 (E.D. Pa. 1971) .. 42
Brooks v. United States, 337 U.S. 49 (1949) 29
Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972) 15

Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971) 15
Cappadora v. Celebrezze, 356 F.2d 1 (2d Cir. 1966) 36
Carriso v. United States, 106 F.2d 707 (9th Cir. 1939) .. 28
Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) 17, 35

PAGE

Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) 35
Chambers v. United States, 451 F.2d 1045 (Ct. Cl. 1971) 8, 29
Christian v. New York Department of Labor, 414 U.S. 614 (1974) 54, 65
Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970) 36
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 3
City of New York v. Ruckelshaus, 358 F.Supp. 669 (D.D.C. 1973) 24
Clackamas County, Oregon v. Mackay, 219 F.2d 479 (D.C. Cir. 1954) 26
Clay v. United States, 210 F.2d 686 (D.C. Cir. 1954) .. 31
Compagnie General Translantique v. United States, 21 F.2d 465 (S.D.N.Y. 1927) 28, 29
Congress of Racial Equality v. Commissioner, 270 F.Supp. 537 (D. Md. 1967) 12
Copeland v. Mead Corp., 51 F.R.D. 266 (N.D. Ga. 1970) 15
Cortwright v. Resor, 325 F.Supp. 797 (E.D.N.Y. 1971) 32

Damico v. California, 389 U.S. 416 (1967) 46
Davis v. Romney, 355 F.Supp. 29 (E.D. Pa. 1973) 36
Davis v. Washington, 352 F.Supp. 187 (D.D.C. 1972) 23
District of Columbia v. Carter, 409 U.S. 418 (1973) 7, 8, 16, 17
Dugan v. Rank, 372 U.S. 609 (1963) 34

Estrada v. Ahiens, 296 F.3d 690 (5th Cir. 1969) 37
Ex Parte Young, 209 U.S. 123 (1908) 33, 34

Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964) 32

PAGE

Faruki v. Rogers, 349 F.Supp. 723 (D.D.C. 1972) 23

Garfield v. United States ex rel. Goldsby, 211 U.S. 249 (1908) 24
Gibson v. Mississippi, 162 U.S. 595 (1866) 23
Glover v. Daniel, 434 F.2d 617 (5th Cir. 1970) 14
Glover v. St. Louis, etc., R.R., 393 U.S. 324 (1969) 50, 52
Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969) 12, 29
Griggs v. Duke Power Co., 461 U.S. 424 (1971) 49
Grubbs v. Butz, 514 F.2d 1323 (D.C. Cir. 1975) 49, 59, 66
Guerra v. Manchester Terminal Corp., 350 F.Supp. 529 (S.D. Tex. 1972) 15

Hackett v. McGuire Brothers Inc., 445 F.2d 442 (3d Cir. 1971) 15
Hague v. C.I.O., 307 U.S. 496 (1939) 19
Harris v. Kaine, 352 F.Supp. 769 (S.D.N.Y. 1972) 36
Henderson v. Defense Contract Administration Services, 370 F.Supp. 180 (S.D.N.Y. 1973) 6, 23
Hill v. United States, 40 Fed. 441 (C.C. Mass. 1889) 27
Hurd v. Hodge, 334 U.S. 24 (1948) 16, 17
Huston v. General Motors Corp., 477 F.2d 1003 (8th Cir. 1973) 6

Indian Trading Co. v. United States, 350 U.S. 61 (1955) 21

Jackson v. United States, 129 F.Supp. 537 (D. Utah 1955) 30
James v. Ogilvie, 310 F.Supp. 661 (N.D. Ill. 1970) 15
Jarrett v. Resor, 426 F.2d 213 (9th Cir. 1970) 22
Jenkins v. General Motors Corp., 475 F.2d 764 (5th Cir. 1973) 15
Johnson v. Cain, 5EPD ¶8509 (D.Del. 1973) 14, 35

PAGE

Johnson v. Goodyear Tire & Rubber Co., 349 F.Supp. 3 (S.D. Tex. 1972) 15
Johnson v. Railway Express Agency, 44 L.Ed. 2d 295 (1975) 9, 14, 40, 46, 47, 49, 63
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 17, 18, 42
Jones v. United States, 127 F.Supp. 31 (E.D.N.C. 1954) 27

Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 (1938) 22
Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969) 37

Lancashire Shipping Co. v. United States, 4 F.Supp. 544 (S.D.N.Y. 1933) 28
Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 643 (1949) 34
Law v. United States, 18 F.Supp. 42 (D.Mass. 1937) 28
Lazard v. Boeing Co., 322 F.Supp. 343 (D. La. 1971) 15
Leonhard v. Mitchell, 473 F.2d 709 (2d Cir. 1973) 23
Lloyds' London v. Blair, 262 F.2d 211 (10th Cir. 1958) 27
Lombard Corporation v. Resoc, 321 F.Supp. 687 (D. D.C. 1970) 37
London v. Florida Department of Health, 313 F.Supp. 591 (N.D. Fla. 1970) 14, 35
Long v. Ford Motor Co., 352 F.Supp. 135 (E.D. Mich. 1972) 40
Long v. Ford Motor Company, 496 F.2d 500 (6th Cir. 1974) 15

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973) 40

PAGE

Malone v. Baldwin, 369 U.S. 643 (1962) 34
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 8, 22, 26, 32
McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1972) 37, 45
McGee v. United States, 402 U.S. 479 (1971) 45
McHoney v. Callaway, No. 74-C-1729, E.D.N.Y. 57
McKart v. United States, 395 U.S. 185 (1969) 45, 49, 50, 58, 61
McLaughlin v. Callaway, No. 74-1237, S.D. Ala. 57
McNeese v. Board of Education, 373 U.S. 668 (1963) 46
McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971) 26
Miguel v. McCarl, 291 U.S. 442 (1934) 24
Mills v. Board of Education of Ann Arundel, 30 F.Supp. 245 (D. Md. 1938) 14
Minnesota v. United States, 305 U.S. 382 (1939) 22
Monroe v. Pape, 365 U.S. 167 (1961) 46
Morrow v. Crisler, 479 F.2d 960 (5th Cir. 1974)..... 14, 35
Morton v. Mancari, 417 U.S. 535 (1974) 9, 17, 23, 41, 44
Murphy v. Colonial Fed. Savings and Loan, 388 F.2d 609 (2d Cir. 1967) 32

N.A.A.C.P. v. Allen, 340 F.Supp. 703 (M.D. Ala. 1972) 35
National Helium Corporation v. Morton, 326 F.Supp. 151 (D. Kan. 1971) 37
National Helium Corporation v. Morton, 455 F.2d 650 (10th Cir. 1971) 37
Northeast Residents Association v. Department of Housing and Urban Development, 325 F.Supp. 65 (E.D. Wis. 1971) 36
Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968) 37

PAGE

Pacific Telephone, etc. Co. v. Keykendall, 265 U.S. 196 (1924) 65
Palmer v. Rogers, 6 EPD ¶8822 (D. D.C. 1973) 31, 32
Parisi v. Davidson, 405 U.S. 34 (1972) 65
Penn v. Schlesinger, 490 F.2d 700 (5th Cir. 1973) 24, 25, 47, 55
Penn v. Schlesinger, 497 F.2d 970 (5th Cir. 1974).....25, 55
Penn v. Schlesinger, No. 74-476 65
Perry v. United States, 308 F.Supp. 245 (D. Colo. 1970) 27
Pettit v. United States, 488 F.2d 1026 (Ct. Cl. 1973)..... 30
Philadelphia Co. v. Stimson, 223 U.S. 605 (1912) 34
Place v. Weinberger, No. 74-116 38
Prentis v. Chesapeake & Ohio Railway, 211 U.S. 210 (1908) 65

Rambo v. United States, 145 F.2d 670 (5th Cir. 1944).... 31
Rayonier v. United States, 352 U.S. 315 (1957) 22
Renegotiation Board v. Bannercraft Co., 415 U.S. 1 (1974) 51
Rice v. Chrysler Corp., 327 F.Supp. 80 (E.D. Mich. 1971) 15
Road Review League v. Boyd, 270 F.Supp. 650 (S.D.N.Y. 1967) 36
Roberts v. United States ex rel. Valentine, 176 U.S. 221 (1900) 24
Ross Packing Co. v. United States, 42 F.Supp. 932 (E.D. Wash. 1942) 28, 29
Rural Electrification Administration v. Northern States Power Co., 373 F.2d 686 (8th Cir. 1967) 22
Rusk v. Cort, 369 U.S. 367 (1962) 36

Sampson v. Murray, 415 U.S. 61 (1974) 24
Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970) 15, 40

PAGE

Scanwell Laboratories Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970) 37
Scheuer v. Rhodes, 416 U.S. 232 (1974) 35
Schicker v. United States, 346 F.Supp. 417 (D. Conn. 1972) 36
Schroeder Nursing Care, Inc. v. Mutual of Omaha Inc. Co., 311 F.Supp. 405 (E.D. Wis. 1970) 37
Screws v. United States, 325 U.S. 91 (1945) 17
Service v. Dulles, 354 U.S. 363 (1957) 24
Settle v. E.E.O.C., 345 F.Supp. 405 (S.D. Tex. 1972).... 35
Sinclair Nav. Co. v. United States, 32 F.2d 90 (5th Cir. 1929) 28
Smiley v. City of Montgomery, 350 F.Supp. 451 (M.D. Ala. 1972) 14
Smith v. United States, 458 F.2d 1231 (9th Cir. 1972) 28
Somma v. United States, 283 F.2d 149 (3rd Cir. 1960)..65, 66
Spanish Royal Mail Line Agency, Inc. v. United States, 45 F.2d 404 (S.D.N.Y. 1930) 28
Sperling v. U.S., 9 EPD ¶10,100 (3d Cir. 1975) 64
Spillway Marina, Inc. v. U.S., 445 F.2d 876 (10th Cir. 1971) 27
Strain v. Philpott, 4 EPD ¶¶7885 (M.D. Ala. 1971).....14, 35
Suel v. Addington, 465 F.2d 889 (9th Cir. 1972).....14, 35
Sullivan v. Little Hunting Park, 396 U.S. 229 (1969).... 42
Sultzbach Clothing Co. v. United States, 10 F.2d 363 W.D. N.Y. 1925) 28
Sutcliffe Storage & Warehouse Co. v. United States, 162 F.2d 849 (1st Cir. 1947) 27
Swain v. Callaway, 5th Cir. No. 75-2002 57

Thorn v. Richardson, 4 EPD ¶7630 (W.D. Wash. 1971) 24
Tillman v. Wheaton-Haven Recreation Association, 410 U.S. 431 (1973) 8, 16, 17, 42

PAGE

Toilet Goods Association v. Gardner, 360 F.2d 677 (2d Cir. 1966) 34

Union Trust Co. v. United States, 113 F.Supp. 80 (D. D.C. 1953) 27
United States ex rel. Parish v. MacVeagh, 214 U.S. 124 (1909) 24
United States v. Emery, Bird, Thayer R.R. Co., 237 U.S. 28 (1915) 29
United States v. Hellard, 322 U.S. 363 (1944) 22
United States v. Hvoslef, 237 U.S. 1 (1915) 28
United States v. Johnson, 153 F.2d 846 (9th Cir. 1946) 27
United States v. Jones, 109 U.S. 513 (1883) 22
United States v. Shaw, 309 U.S. 495 (1939) 22
United States v. Yellow Cab Co., 340 U.S. 543 (1950)..22, 27

Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967) 34
Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970) 15, 40
Watkins v. Washington, 3 EPD ¶8291 (D.D.C. 1971) .. 35
Weinberger v. Salfi, 43 U.S.L.W. 4985 (1975) 45, 49, 51
Weinberger v. Weisenfeld, 43 U.S.L.W. 4393 (1975) 45, 49
West v. Board of Education of Prince George's County, 165 F.Supp. 382 (D.Md. 1958) 14
Work v. United States ex rel. Lynn, 266 U.S. 161 (1924) 24

Young v. International Telephone & Telegraph, 438 F.2d 757 (3d Cir. 1971) 40
Young v. International Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971) 15
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 34

Zwickler v. Koota, 389 U.S. 241 (1967) 47

Constitutional Provisions: PAGE

U.S. Constitution, Article I, section 9 28
U.S. Constitution, Fourth Amendment 28
U.S. Constitution, Fifth Amendment 13, 21, 23, 28, 36, 43
U.S. Constitution, Eleventh Amendment 33

Statutes:

5 U.S.C. §702 .....13, 36
5 U.S.C. §704 45
5 U.S.C. §706 36
25 U.S.C. §461 44
5 U.S.C. §7151 .....12, 13, 23, 43, 54
28 U.S.C. §1254 (1) 1
28 U.S.C. §1331 .....3, 8, 13, 27, 31, 32, 35, 37, 43, 53
28 U.S.C. §1343 .....3, 8, 19, 20, 21
28 U.S.C. §1346 .....4, 7, 8, 13, 26, 27, 28, 29, 30
28 U.S. §1361 .....4, 7, 8, 13, 22, 26, 30, 31
28 U.S.C. §1491 .....8, 29, 40
42 U.S.C. §1971(c) 42
42 U.S.C. §1981 .....3, 7, 8, 13-17, 20, 21, 23, 40, 42-48, 50, 58, 61
42 U.S.C. §1982 .....7, 8, 16, 17, 42

PAGE

42 U.S.C. §1983 ..... 15, 42

42 U.S.C. §2000a 42

42 U.S.C. §2000e-5; Section 706 of Title VII 39, 43

42 U.S.C. §2000e-6; Section 707 of Title VII 39

42 U.S.C. §2000e-16; Section 717 of Title VII 1, 2, 6, 7, 9, 11, 13, 38-44, 47, 54, 58, 59, 63, 64, 66

42 U.S.C. §3612 42

Administrative Procedure Act 7, 8, 13, 36, 37, 45

Civil Rights Act of 1866 ..... 7, 9, 13-20, 23, 37, 45, 53, 62

Civil Rights Act of 1870 ..... 15, 20

Civil Rights Act of 1871 20

Civil Rights Act of 1957 42

Civil Rights Act of 1964 2

Fugitive Slave Act 18

Immigration and Nationality Act of 1952 36

Indian Reorganization Act of 1934 ..... 9, 44

Mandamus Act 7, 8, 13, 22, 37, 46

National Labor Relations Act 28

Social Security Act 28

Transportation Act 28

Tucker Act 7, 8, 13, 14, 26, 27, 29, 30, 31, 37, 43, 46, 53

14 Stat. 27 ..... 15, 16, 19, 20

14 Stat. 28 19

PAGE

14 Stat. 29 19

16 Stat. 140 15

76 Stat. 744 ..... 30, 31

78 Stat. 699 30

Anno. Code of Cal., §1422 48

Code of Ala., Title 7, §5526 48

Code of S.C., §10-146 48

New York Civil Practice Law and Rules, §214 48

Tenn. Code Anno. §28-304 48

Vernon's Anno. Texas Revised Civil Statutes, Art. 5526 48

Regulations:

5 C.F.R. part 351 57

5 C.F.R. part 532 57

5 C.F.R. part 713 ..... 12, 13, 24, 29, 43, 45, 46, 57

5 C.F.R. part 771 57

5 C.F.R. §300.103 57

5 C.F.R. §713.201 24

5 C.F.R. §713.203 54

5 C.F.R. §713.213 48

5 C.F.R. §713.214 53

5 C.F.R. §713.216 60

5 C.F.R. §713.217 60

5 C.F.R. §713.219 57

5 C.F.R. §713.220 ..... 47, 62

PAGE

5 C.F.R. §713.251 57

5 C.F.R. §713.261 57

5 C.F.R. §713.271 .....8, 25, 53

5 C.F.R. §772.306 57

Executive Orders:

Executive Order 9980 24

Executive Order 10590 24

Executive Order 10925 24

Executive Order 11246 24

Executive Order 11478 .....13, 24, 29, 41, 43

Executive Order 11590 24

Legislative Materials:

S. Rep. No. 92-415, 92nd Cong., 1st Sess. 23, 38, 49, 52, 57

S. Rep. 1390, 88th Cong., 1st Sess. 30, 31

H. Rep. No. 92-238, 92nd Cong., 1st Sess. 49, 51, 63

H. Rep. 1604, 88th Cong., 2d Sess. 30

Hearings Before a Subcommittee of the Senate Committee on Labor & Public Welfare, 92 Cong., 1st Sess. (1971) 12, 13, 42

Hearings Before a Subcommittee of the Senate Judiciary Committee, 91st Cong., 2d Sess. (1970) 12, 13

Hearings Before the Subcommittee on Labor of the House Committee on Education and Labor, 92 Cong., 1st Sess. (1971) 12

Cong. Globe, 38th Cong., 1st Sess. 21

PAGE

Cong. Globe, 39th Cong., 1st Sess. 20

108 Cong. Rec. 26

110 Cong. Rec. 31, 42

117 Cong. Rec. 39

118 Cong. Rec. 38, 39, 42, 43

Other Authorities:

G. Bentley, History of the Freedmen's Bureau (1955).. 18

M. King, Lyman Trumbull (1965) 18

Moore's Federal Practice 27

K. Stamp, The Era of Reconstruction (1965) 18

Schlesinger and Israel, The State of the Union Messages of the President (1966) 21

ten Broek, Equal Under Law (1951) 18, 20

U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort 1974 .....52, 53, 54, 61

Byse and Fiucca, "Section 1361 of the Mandamus and Venue Act of 1962", 81 Harv. L. Rev. 308 (1967)..... 26

Graham, "The Conspiracy Theory" of the Fourteenth Amendment", 47 Yale L.J. 371 (1938) 20

Graham, "The Early Anti-Slavery Backgrounds of the Fourteenth Amendment", 1950 Wisc. L. Rev. 479..... 20

Board of Appeals and Review. Work Load Statistics, Fiscal Years 1972, 1973, 1974 64

In the

Supreme Court of the United States

October Term, 1975

No. 74-768

Clarence Brown,

Petitioner,

v.

General Services Administration, *et al.*

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported at 507 F.2d 1300, and is set forth in the Appendix to the Petition, pp. 2a-18a. The opinion order of the District Court, which is not reported, is set forth in the Appendix to the Petition, p. 1a.

Jurisdiction

The judgment of the Court of Appeals was entered on November 21, 1974. The Petition was filed on December 20, 1974 and granted on May 27, 1975. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Is jurisdiction over this action conferred by statutes enacted prior to the adoption in 1972 of section 717 of Title VII?

2. Was this action properly dismissed for failure to exhaust administrative remedies?

Statutory Provisions Involved

Section 717(a) of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000e-16(a), provides:

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds) in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex or national origin.

Section 717(c) of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. §2000e-16(c), provides:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Section 1981, 42 U.S.C., provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1331(a), 28 U.S.C., provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

Section 1343(4), 28 U.S.C., provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> • • • • •

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Section 1346, 28 U.S.C., provides in pertinent part:

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

• • • • •

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Section 1361, 28 U.S.C., provides:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States of any agency thereof to perform a duty owed to the plaintiff.

Statement of the Case

Petitioner is black and has for eighteen years been an employee of the General Services Administration, hereinafter "GSA".[1] (A. 4a) He is a GS-7 but has been certified eligible and rated "highly qualified" for a GS-9 position. He has for the past eight years been repeatedly denied that GS-9 promotion. (A. 15a-17a)

[1] Subsequent to the filing of the Petition for Writ of Certiorari, petitioner was transferred to another government agency. That lateral transfer has no effect on his claim for back pay or injunctive relief. Petitioner is still a GS-7 and still wants the specific GS-9 position in the General Services Administration for which he applied in 1971.

October 19, 1970, the names of petitioner and two whites were submitted to petitioner's white supervisor for the filling of a GS-9, Communications Specialist, vacancy; all of the candidates were rated "highly qualified;" a white obtained the promotion. Immediately thereafter, petitioner contacted his Equal Employment Opportunity Counsellor at GSA and was advised to withhold a formal complaint of discrimination because two new GS-9 vacancies were imminent; petitioner complied with the EEO Counsellor's request and terminated proceedings. (A. 36a)

June 15, 1971, the names of petitioner and two whites were submitted to petitioner's supervisor for the filling of a GS-9 vacancy; on this occasion only petitioner and one of the white candidates were rated "highly qualified;" a white candidate was again selected. On July 15, 1971, petitioner filed his Complaint of Discrimination against the Director of the Transportation and Communications Service and the Chief of the Commissions Division, GSA.

Petitioner's complaint alleged *inter alia*, that he had been seeking a promotion since 1967 to a GS-9 position and that in every instance he had been rejected because of his race. (A. 5a-15a) The agency investigation revealed that petitioner had been repeatedly passed over for promotion in favor of white employees. In addition, subsequently published statistics reveal that, while blacks are employed at GSA in significant numbers in grades GS-7 and lower, they are clearly under-represented in all grades GS-8 and above (Appendix A, *infra*, p. 1aa). October 19, 1972, GSA notified petitioner that on the basis of the investigative file it proposed to find that it had not discriminated against him and advised him of his right to a hearing. (A. 30a)

December 13, 1972, a hearing was held on petitioner's complaint. February 9, 1973, the Hearing Examiner found, on the basis of petitioner's supervisors' testimony, that the whites selected for the positions in contest were more "cooperative" than the petitioner and, accordingly, that petitioner was not passed over because of his race. (A. 40a)

March 23, 1973, twenty months after petitioner filed his administrative complaint, GSA issued its final agency decision concluding that it had not discriminated against petitioner on the basis of race.[2] (A. 43a)

Petitioner was notified of the agency decision on March 26, 1973. (A. 45a) The letter of notification advised him that he could within 30 days commence a civil action in the United States District Court, or within 15 days file an appeal to the Appeals Review Board of the Civil Service Commission. On the basis of this letter petitioner decided to file suit. Because petitioner had great difficulty locating an attorney who would represent him, he did not succeed in filing his complaint until May 7, 1973, 12 days after the deadline for filing an action under section 717.[3]

[2] On August 10, 1973, the government moved to dismiss this action in the district court on the ground, *inter alia*, that petitioner had not commenced his action within the 30 days required under section 717. On July 27 and September 24, 1973 the same United States Attorney filed memoranda in the same district court, in *Henderson* v. *Defense Contract Administration Services*, 370 F.Supp. 180 (S.D. N.Y. 1973), arguing that section 717 did not apply to employees such as petitioner who were the victims of discrimination prior to March 24, 1972.

[3] Within a week of receiving the letter of March 23, petitioner presented himself and the letter to the clerk of the United States District Court for the Southern District of New York, where the *pro se* clerk advised him to retain a private attorney. Compare, *Huston* v. *General Motors Corp.*, 477 F.2d 1003 (8th Cir. 1973). Prior to obtaining the services of counsel, petitioner unsuccessfully sought assistance from three other attorneys and several civil rights organizations.

However, petitioner asserted federal jurisdiction under several statutes other than §717.

On September 27, 1973, the District Court for the Southern District of New York dismissed the action for lack of jurisdiction (Petition, p. 1a). On November 21, 1974, the Court of Appeals for the Second Circuit affirmed that dismissal (Petition, pp. 2a-18a). The Second Circuit concluded: (1) that section 717 had, by implication, repealed *pro tanto* the Tucker Act, the Mandamus Act, the 1866 Civil Rights Act, the Administrative Procedure Act, and the other statutes which petitioner asserted created federal jurisdiction; (2) that section 717 applied to discrimination occurring prior to its effective date, March 24, 1972, and that the implied repeal was accordingly retrospective; and (3) that in any event, petitioner could not sue because he had not filed an appeal from the final agency decision to the Appeals Review Board of Civil Service Commission, and thus had not completely exhausted his administrative remedies.

Summary of Argument

I. A. Prior to the adoption, in 1972, of section 717 of Title VII, which gave federal employees the same right to sue under Title VII enjoyed by private employees, federal jurisdiction to remedy federal employment discrimination already existed under several other statutes.

1. The 1866 Civil Rights Act, 42 U.S.C. § 1981, prohibits all forms of employment discrimination, including discrimination by the federal government. This Court has already held that § 1982, which also derives from the 1866 Act, applies to the federal government, *District of Colum-*

bia v. *Carter*, 409 U.S. 418 (1973), and that § 1981 and § 1982 should be similarly construed. *Tillman* v. *Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973). *Carter* and *Tillman* compel the conclusion that § 1981 applies to the federal government. Section 1343(4), 28 U.S.C., confers jurisdiction to enforce § 1981.

2. The Mandamus Act, 28 U.S.C. § 1361, authorizes the district courts to issue writs of mandamus to enforce the prohibition against federal employment discrimination contained in the Fifth Amendment, several statutes and executive orders, and the applicable regulations. Since federal officials have no discretion to discriminate against petitioner on the basis of race, their duty to act in a non-discriminatory manner is ministerial. Because discrimination is unlawful, the responsible officials are not protected by sovereign immunity. *Marbury* v. *Madison*, 5 U.S. 137 (1803). Although mandamus is not usually available to compel the payment of money, it is when there is ministerial duty to make a payment. The applicable regulations create such an absolute duty to make an award of back pay in any case of federal employment discrimination. 5 C.F.R. § 713.271(b).

3. The Tucker Act, 28 U.S.C. § 1346, confers jurisdiction on the district courts over actions against the United States founded upon the Constitution or any law or regulation. Section 1346 was amended in 1964 for the express purpose of permitting federal employees to sue for back pay. The similar language of 28 U.S.C. § 1491 has been construed by the Court of Claims to establish jurisdiction over federal employment discrimination actions. *Chambers* v. *United States*, 451 F.2d 1045 (Ct. Cl. 1971).

4. Jurisdiction over this action is also conferred by 28 U.S.C. § 1331 and the Administrative Procedure Act.

B. Section 717 did not repeal the remedies for federal employment discrimination which existed before 1972.

In construing section 717, the Court should look to the meaning and construction of Title VII as applied to private employees, since section 717 was adopted to give federal employees the same rights already enjoyed by private workers. This Court has already held that Title VII did not repeal the pre-existing remedies of private employees. *Johnson* v. *Railway Express Agency*, 44 L.Ed. 2d 295 (1975).

Section 717 does not expressly repeal the 1866 Civil Rights Act or any other remedy. Repeals by implication are not favored. Congress expressly rejected proposals to make Title VII the exclusive remedy for employment discrimination. In *Morton* v. *Mancari*, 417 U.S. 535 (1974), this Court held that the substantive provisions of section 717 did not repeal the apparently inconsistent preference for Indian employees in the Indian Reorganization Act of 1934. It follows, *a fortiori*, that section 717 did not repeal the existing complimentary remedies enforcing the same substantive prohibition against racial discrimination.

II. A. Exhaustion of administrative remedies should not be required of federal employees who bring employment discrimination actions under statutes other than Title VII. Exhaustion is not required of state or private employees who bring employment discrimination cases under the 1866 Civil Rights Act. *Johnson* v. *Railway Express Agency*, 44 L.Ed. 2d 295 (1975). Federal employees should not be treated differently. The administrative procedure established by the Civil Service Commission is merely one of several independent remedies among which employees may choose.

The traditional factors which militate in favor of an exhaustion requirement are not present in a federal em-

ployment discrimination case. Congress correctly concluded in 1972 that neither the Civil Service Commission nor the agencies have any expertise in employment discrimination matters. Since the finding of discrimination is mandatory on the establishment of certain facts, this is not an area where the agencies have any discretion to exercise. In July, 1975, the Civil Rights Commission concluded, as had Congress three years earlier, that the administrative procedure is so biased against aggrieved employees as to make resort thereto essentially futile. In Fiscal Year 1973, of 26,627 informal complaints and 2,743 formal complaints by federal employees, only 22 resulted in back pay or retroactive promotions.

If exhaustion were generally required, the federal courts would be obligated to determine (a) whether each particular complaint would have been futile in view of the many defects in the administrative procedure, and (b) whether an employee had chosen the correct administrative procedure among the 9 different procedures established by regulation. The judicial time consumed in deciding these questions would be better used resolving the merits of the discrimination claims. The delays and effort required to vigorously prosecute an administrative complaint place a significant burden on employees, and should not be imposed where there is little chance of success. Because of the great importance of eradicating discrimination, the most efficacious remedy should be the first invoked, and the choice of remedy should be made by the aggrieved employee, not by the courts.

B. Even if exhaustion is generally required in federal employment discrimination cases, further exhaustion efforts should not be required in this case. Although Civil Service Commission regulations require an agency to resolve a discrimination case within 180 days, the defendant agency

did not decide the instant case for 617 days. It would be unreasonable to impose on petitioner the further delay of an administrative appeal. Congress, in adopting section 717, made appeals to the Appeals Review Board optional because it concluded such appeals were generally futile. This Court should not require plaintiffs suing under statutes other than Title VII to meet a more stringent exhaustion requirement than Congress thought reasonable.

Should the Court conclude that petitioner's suit was premature, the appropriate disposition of this action is not dismissal with prejudice but merely an appropriate stay of judicial proceedings while exhaustion is completed. This is the usual practice in cases of inadequate exhaustion. If the government objects to this action because it claims petitioner's case should be considered by the Appeals Review Board, it must now afford petitioner an opportunity to appeal to the Board.

ARGUMENT

I.

Jurisdiction Over This Action Is Conferred By Statutes Adopted Prior To Section 717 of Title VII of The 1964 Civil Rights Act.

In 1971-72, when Congress was considering adopting section 717 or other legislation to assure federal employees a right to judicial determination of their claims of discrimination, both the Civil Service Commission and the Department of Justice advised Congress that federal employees already had that right. Irving Kator, the Deputy Executive Director of the Commission, testified:

> "There is also little question in our mind that a Federal employee who believes he has been discrim-

inated against may take his case to the Federal courts . . . ."[4]

The Commission submitted a written statement insisting:

"We believe Federal Employees now have the opportunity for court review of allegations of discrimination, and believe they should have such a right."[5]

The Commission argued that the then leading cases denying federal employees such a right to sue, *Gnotta* v. *United States*, 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970), and *Congress of Racial Equality* v. *Commissioner*, 270 F.Supp. 537 (D.Md. 1967), were incorrectly decided.[6] Assistant Attorney General Ruckelshaus assured a Senate subcommittee that the courts could remedy any unconstitutional or unlawful federal action.[7] Although

[4] Hearings Before Subcommittee of the Senate Committee on Labor & Public Welfare, 92 Cong., 1st Sess. 301 (1971) p. 296.

[5] *Id.* p. 310.

[6] The Commission reasoned: "As it appears that the attention of the court in the *CORE* case was not directed to the statute (5 U.S.C. § 7151) . . . and that case involved no constitutional issue, we do not regard it as dispositive of the matter under consideration. To the same effect see *Gnotta* v. *United States*, 415 F.2d 1271 (8th Cir. 1969), in which one court found no jurisdiction to review an alleged failure of promotion due to discrimination but did not discuss the statutory or constitutional issues that might be involved in such an action. We are of the opinion that an individual who has exhausted the discrimination complaint procedure provided in Part 713 of the Civil Service regulations (5 CFR part 713) may obtain judicial review of the alleged discriminatory action . . ." Hearings Before the Subcommittee on Labor of the House Committee on Education and Labor, 32 Cong., 1st Sess. 386 (1971).

[7] Hearings Before a Subcommittee of the Senate Judiciary Committee, 91st Cong., 2d Sess. (1970), pp. 69, 74, 256-257:

"[T]o some extent injunctive remedies are already available. The constitutionality of any program can be challenged. The authority within the program of an official to act can be challenged."

"[T]here is no doubt that a court today may look into unauthorized or unconstitutional agency action . . ."

the Civil Service Commission insisted that section 717 "would add nothing"[8] to the rights federal employees already enjoyed under earlier statutes, Congress adopted section 717 in view of its concern that the courts might not construe the existing statutes to provide such a remedy.

Petitioner asserts that jurisdiction over his claims of federal employment discrimination is conferred by statutes adopted prior to section 717: the 1866 Civil Rights Act,[9] the Mandamus Act,[10] the Tucker Act,[11] the Administrative Procedure Act[12] and 28 U.S.C. §1331, and that the defendants' alleged refusal to promote him on account of race violates the Fifth Amendment, the 1866 Civil Rights Act, 5 U.S.C. §7151,[13] Executive Order 11478[14] and 5 C.F.R. part 713.[15] Petitioner urges that sovereign immunity pre-

[8] Hearings Before Subcommittee on Labor of the Senate Committee on Labor & Public Welfare, 92d Cong., 1st Sess. 301 (1971).

[9] 42 U.S.C. §1981.

[10] 28 U.S.C. §1361.

[11] 28 U.S.C. §1346.

[12] 5 U.S.C. §§702-06.

[13] 5 U.S.C. §7151 provides:

It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex or national origin. The President shall use his existing authority to carry out this policy.

[14] See n.39, *infra*, p. 23.

[15] See n.40, *infra*, p. 24.

sents no obstacle to injunctive relief requiring an end to discrimination, to injunctive relief to enforce the ministerial duty to award back pay in cases of discrimination, or to monetary relief against the defendant individuals. A waiver of sovereign immunity is necessary for awards of punitive and compensatory damages, and that waiver is found in the Tucker Act and the 1866 Civil Rights Act.

A. 1. *The 1866 Civil Rights Act*

Section 1981, 42 U.S.C., which derives from Section 1 of the 1866 Civil Rights Act, provides that "All persons within the jurisdiction of the United States shall have the same right in every state and Territory to *make and enforce contracts*. . . ." (Emphasis added). This includes employment contracts and thus entails a ban on racial discrimination in hiring and promotion. *Johnson* v. *Railway Express Agency*, 44 L.Ed. 2d 295, 301 (1975). Section 1981 has been uniformly held to bar discrimination in employment by state[16] and local[17] governments, by pri-

[16] See, *e.g. Johnson* v. *Cain*, 5 EPD ¶ 8509 (D. Del. 1973); *Suel* v. *Addington*, 465 F.2d 889 (9th Cir. 1972); *Strain* v. *Philpott*, 4 EPD ¶¶ 7885, 7562, 7521 (M.D. Ala. 1971); *Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir. 1974) (en banc); *London* v. *Florida Department of Health*, 313 F.Supp. 591 (N.D. Fla. 1970).

[17] See, *e.g.*, *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971); *Arrington* v. *Massachusetts Bay Transportation Authority*, 306 F.Supp. 1355 (D. Mass. 1969); *Glover* v. *Daniel*, 434 F.2d 617 (5th Cir., 1970); *Smiley* v. *City of Montgomery*, 350 F. Supp. 451 (M.D. Ala. 1972); *West* v. *Board of Education of Prince George's County*, 165 F.Supp. 382 (D. Md. 1958); *Mills* v. *Board of Education of Ann Arundel*, 30 F.Supp. (D. Md. 1938).

vate employers,[18] and by labor unions.[19] Jurisdiction over federal employment discrimination actions was expressly upheld under §1981 in *Bowers* v. *Campbell*, 505 F.2d 1155 (9th Cir. 1974).

The class of persons protected by section 1981 is described in the all encompassing language to be "[a]ll persons within the jurisdiction of the United States." Had Congress wished to limit the statute to exclude federal discrimination, it knew how. Section 1983, 42 U.S.C., expressly limits coverage action under color of the state law, as did a number of other post Civil War civil rights provisions. See, *e.g.*, 16 Stat. 140, §§1-3.[20]

[18] See, *e.g.*, *Sanders* v. *Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Rice* v. *Chrysler Corp.*, 327 F.Supp. 80 (E.D. Mich. 1971); *Hackett* v. *McGuire Brothers Inc.*, 445 F.2d 442 (3d Cir. 1971); *Young* v. *International Tel & Tel. Co.*, 438 F.2d 737 (3d Cir. 1971); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972), *cert. denied*, 93 S. Ct. 319 (1972); *Boudreau* v. *Baton Rouge Marine Contracting*, 437 F.2d 1011 (5th Cir. 1971); *Caldwell* v. *National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 404 U.S. 998 (1970); *Brady* v. *Bristol Myers*, 452 F.2d 621 (8th Cir. 1972); *Bennett* v. *Gravelle*, 323 F.Supp. 203 (D. Md. 1971); *Copeland* v. *Mead Corp.*, 51 F.R.D. 266 (N.D. Ga. 1970); *Lazard* v. *Boeing Co.*, 322 F.Supp. 343 (E.D. La. 1971); *Long* v. *Ford Motor Co.*, 352 F.Supp. 135 (E.D. Mich. 1972); *Guerra* v. *Manchester Terminal Corp.*, 350 F.Supp. 529 (S.D. Tex. 1972); *Jenkins* v. *General Motors Corp.*, 475 F.2d 764 (5th Cir. 1973).

[19] *Waters* v. *Wisconsin Steel Works*, 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970); *James* v. *Ogilvie*, 310 F.Supp. 661 (N.D. Ill. 1970); *Guerra* v. *Manchester Terminal Corp.*, 350 F.Supp. 529 (S.D. Tex. 1972); *Johnson* v. *Goodyear Tire & Rubber Co.*, 349 F.Supp. 3 (S.D. Tex. 1972); *Jenkins* v. *General Motors Corp.*, 475 F.2d 764 (5th Cir. 1973).

[20] The criminal provisions of section 2 of the 1870 Civil Rights Act, 16 Stat. 140, apply only to conduct under color of *state* law; the criminal provisions of the 1866 Act apply to conduct under color of *any* law. 14 Stat. 27. See n.22, *infra*, p. 17.

That section 1981 prohibits federal discrimination is compelled by *District of Columbia* v. *Carter*, 409 U.S. 418 (1973) and *Tillman* v. *Wheaton Haven Recreation Asso.*, 410 U.S. 431 (1973). Section 1981 was originally enacted as part of Section 1 of the 1866 Civil Rights Act, 14 Stat. 27. Section 1 of that Act protected, not only the rights now covered in §1981, including the right to contract, but also the right to buy and own real property. Manifestly if any one of the rights covered by section 1 was protected against federal discrimination, all must have been, for the enumeration of rights draws no distinction among them. Subsequent to 1866, section 1 of the Civil Rights Act was divided into two sections; the provisions regarding real property were placed in 42 U.S.C. §1982,[21] and the other provisions in §1981. This restructuring, however, involved no change in substance. The scope of §1981 and §1982 are necessarily the same. In *Tillman* v. *Wheaton Haven Recreation Asso.*, 410 U.S. 431 (1973), the Court held:

> The operative language of both §1981 and §1982 is traceable to the Act of April 9, 1866, c.31, 1, 14 Stat. 27. *Hurd* v. *Hodge*, 334 U.S. 24, 30-31 (1948). In light of the historical interrelationship between §1981 and §1982, we see no reason to construe these sections differently . . .

410 U.S. at 439-40. Since the Court had concluded that §1982 covered discrimination by private clubs, it held that §1981 did as well.

Hurd v. *Hodge*, 334 U.S. 24 (1948), and *District of Columbia* v. *Carter*, 409 U.S. 418 (1973), hold that section 1982 applies to discrimination by the federal government.

---

[21] "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

That provision bars

> all such discrimination, private as well as public, *federal as well as state. Jones* v. *Alfred H. Mayer & Co.*, *supra*, at 413. With this in mind, it would be anomalous indeed if Congress chose to carve out the District of Columbia as the sole exception to an act of otherwise universal application. And this is all the more true where, as here, the legislative purposes underlying §1982 support its applicability in the District. The dangers of private discrimination, for example, that provided a focal point of Congress' concern in enacting the legislation, were and are, as present in the District of Columbia as in the States, and the same considerations that led Congress to extend the prohibitions of §1982 *to the Federal Government* apply with equal force to the District, which is a mere instrumentality of that Government. 409 U.S. at 422.[22] (Emphasis added).

The reasoning of *Carter* is fully applicable to §1981;[23] since §1982 applies to the Federal government, §1981 does so as well.

The legislative background of the 1866 Civil Rights demonstrates the correctness of *Carter*, *Hodge* and *Tillman*, and gives no reason to believe that Congress would have intended to deny to newly freed slaves protection from discrimination by federal officials.[24] It is unlikely that Con-

---

[22] See also *Screws* v. *United States*, 325 U.S. 91, 97, n.2 (1945) (§2 of the 1866 Act, rendering criminal certain discrimination against "any inhabitant of any State, Territory or District," applies to federal officials).

[23] *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954), found "unthinkable" the suggestion that while the states were prohibited from discriminating in education the federal government was not. On the extent and nature of racial discrimination in federal service, see *Morton* v. *Mancari*, 417 U.S. 535, 545 n.22 (1974).

[24] The abolitionists in control of Congress in 1866 had for a generation been anxious to abolish slavery and all its trappings

gress, having forbidden slavery throughout the nation, intended by section 1 of the Civil Rights Act to abolish the "badges of slavery" only in the states and to leave them intact in the nation's capitol. See *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968).[25] The memory of the mistreatment of blacks by federal officials under the Fugitive Slave Act was still fresh in the minds of abolitionists in 1866.[26] Freedmen's Bureau agents were reported to be more sympathetic to the desires of white Southern planters than the needs of freedmen.[27] By April of 1866, Congress was aware of President Johnson's opposition to its reconstruction program, and believed that he was actively undermining enforcement of new legislation and dismissing federal officers who supported Congress' policies.[28] That concern about the conduct of federal offi-

---

in the District of Columbia. Henry B. Stanton, in an address to the Massachusetts legislative urging abolition in the District of Columbia, had argued: "[H]aving robbed the slave of himself, and thus made him a thing, Congress is consistent in denying to him all the protection of the law as a man. His labor is coerced from him by laws of Congress: No bargain is made, no wage is given . . . There is not the shadow of legal protection for the family state among the slaves of the District . . . No slave can be a party before a judicial tribunal, . . . in any species of action against any person, no matter how atrocious may have been the injury received. He is not known to the law as a person: much less, a person with civil rights . . . Congress should immediately restore to every slave, the ownership of his own body, mind and soul, transfer them from things without rights, to men with rights . . . the slave himself should be legally protected in life and limb, in his earnings, his family and social relations, and his conscience." ten Broek, Equal Under Law, p. 46, 41-57 (1951).

[25] Congress also had ample reason for concern that the federal officials of the Freedmen's Bureau, established in 1865, were seriously mistreating and exploiting the newly freed black former slaves. G. Bentley, History of the Freedmen's Bureau, 77, 84, 125-132 (1955).

[26] See J. Ten Broek, Equal Under Law, 57-65 (1951); *Ableman* v. *Booth*, 21 How. (62 U.S.) 506 (1858).

[27] See *e.g.* K. Stamp, The Era of Reconstuction, 133-34 (1965).

[28] See M. King, Lyman Trumbull, 293-95 (1965).

cials is manifest in other provisions of the 1866 Civil Rights Act, which compels federal marshalls, on pain of criminal punishment, to enforce the Act,[29] expressly requires that the district attorneys and other officials be paid for enforcing the Act at the usual rates,[30] and authorized the circuit courts, rather than the President, to appoint commissioners with the power to arrest and imprison persons violating the Act.

The 1866 Civil Rights Act, in addition to forbidding employment discrimination in section 1, expressly provided a judicial remedy:

> [T]he district courts of the United States, within their respective districts, shall have . . . cognizance . . . concurrently within the circuit courts of the United States, of all cases, civil and criminal, affecting persons who are denied . . . any of the rights secured to them by the first section of this act . . .

14 Stat. 27. This provision is now incorporated in 28 U.S.C. §1343(4).[31]

It is particularly unlikely that the Congress which enacted the 1866 Civil Rights Act could have intended that, to the extent that federal officials violated its provisions,

---

[29] 14 Stat. 28, §5.

[30] 14 Stat. 29, §7.

[31] "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

• • •

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

See *Hague* v. *C.I.O.*, 307 U.S. 496, 508, n.10 (1939).

aggrieved citizens would have no legal remedy.[32] The abolitionists who finally won control of the Congress in the 1860's and 1870's had long maintained that the rights described in Reconstruction Amendments, and legislation were not new, but already existed by virtue of the privileges and immunities clause and the Bill of Rights.[33] The purpose of such Amendments and legislation was, above all, to make those rights *enforceable*. The 1866 Civil Rights Act was entitled "An Act to protect all Persons in the United States in the Civil Rights, and *Furnish the Means of their Vindication*." 14 Stat. 27 (emphasis added) Congressman Wilson, speaking in favor of the 1866 Civil Rights Bill, explained:

> Mr. Speaker, I think I may safely affirm that this bill, so far as it declares the equality of all citizens in the enjoyment of Civil rights and immunities, merely affirms existing law. We are following the Constitution. We are reducing to stature form the spirit of the Constitution. We are establishing no new right, declaring no new principle. It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen. Cong. Globe, 39th Cong. 1st Sess. 1117.

[32] If Congress had wanted to limit jurisdiction to discrimination involving state action, it knew how to do so. Sections 2 and 3 of the 1870 Civil Rights Act and section 1 of the 1871 Civil Rights Act expressly restrict their coverage to action taken under color of state law, as does 28 U.S.C. §1343(3). No such limitation is to be found in section 2 of the 1866 Act or section 1343(4), and its absence must be taken as revealing Congressional intent to do just what those provisions said—confer jurisdiction over *all* violation of §1981, regardless of whether the violation may be by state officials, federal officials, or private parties.

[33] See generally ten Broek, Equal Under Law (1951); Graham, "The Early Anti-Slavery Backgrounds of the Fourteenth Amendment," 1950 Wisc. L. Rev. 479; Graham, "The Conspiracy Theory of the Fourteenth Amendment," 47 Yale L.J. 371 (1938).

Since federal discrimination was already forbidden by the Fifth Amendment, to hold the 1866 Civil Rights Act unenforceable against federal defendants would be to render the Act, in this regard, nugatory.

Section 1981 entails in certain instances[34] a waiver of sovereign immunity. The Congress which enacted section 1981 had no fondness for sovereign immunity, and could not have contemplated that ex-slaves aggrieved by federal misconduct would have to seek a remedy through a private bill.[35] This Court has already made clear that it will not "as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Indian Trading* v. *United States*, 350 U.S. 61, 69 (1955), or "whittle down . . . by refinements" a statute affecting sovereign immunity.

[34] No sovereign immunity would be involved in an action for injunctive relief or to enforce the regulation requiring back pay. See pp. 32-35, *infra*. Section 1981, in conjunction with §1343(4), covers ordinary damages and certain other appropriate relief.

[35] That Congress, only three years earlier, led by many of the prominent abolitionists, had enacted the first comprehensive waiver of federal immunity in an attempt to end the long standing practice of seeking redress from Congress through private bills. President Lincoln, in his first State of the Union message, had urged such abolition:

> It is important that some more convenient means should be provided, if possible, for the adjustment of claims against the Government especially in view of their increased number by reason of the war. It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. *The investigation and adjudication of claims in their nature belong to the judicial department.*

Schlesinger and Israel, The State of the Union Messages of the President, v. 2, 1060 (1966) (Emphasis added). The legislation waiving that immunity was enacted largely to end the practice of redressing grievances through private bills, which left many citizens without a remedy, fostered lobbyists pressing dubious claims, and corrupted the Congress. See Cong. Globe, 38th Cong., 1st Sess. 1674-75.

United States v. *Yellow Cab Co.*, 340 U.S. 543, 550 (1950).[36] On the contrary, precisely because that immunity "gives the government a privileged position, it has been appropriately confined," *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 388 (1938), and any authority to sue "is to be liberally construed." *United States* v. *Shaw*, 309 U.S. 495, 502 (1939). When Congress establishes by statute a legal right, including a right against the federal government, it must be deemed enforceable by the courts unless there is an unequivocal congressional intent to the contrary.[37]

2. *The Mandamus Act*

Section 1361, 28 U.S.C., provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

This provision, enacted in 1962, was intended to confer upon the district courts the mandamus power until then limited to the District Court for the District of Columbia. *Jarrett* v. *Resor*, 426 F.2d 213 (9th Cir. 1970); *Rural Electrification Administration* v. *Northern States Power Co.*, 373 F.2d 686 (8th Cir. 1967), *cert. denied*, 387 U.S. 945. A writ of mandamus is available to compel a federal officer to perform any ministerial act, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), regardless of whether the official's obligation arises under the Constitution, a federal statute,

[36] See also *Rayonier* v. *United States*, 352 U.S. 315, 320 (1957).

[37] *Minnesota* v. *United States*, 305 U.S. 382, 388, n.5 (1939); *United States* v. *Hellard*, 322 U.S. 363 (1944); *United States* v. *Jones*, 109 U.S. 513 (1883), 519-521.

a regulation or an Executive Order. *Leonhard* v. *Mitchell*, 473 F.2d 709, 713 (2d Cir. 1973).

The defendant officials clearly have such a ministerial duty to make promotions without discrimination on the basis of race. The Fifth Amendment guarantee of due process of law absolutely prohibits the federal government from discriminating against blacks in employment, education, or any other regard. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).[38] The authority of the defendants in personnel matters is strictly circumscribed by section 7151 of Title 5 of the United States Code, which declares it to be the official policy of the United States "to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex or national origin," and directs that the President shall carry out this policy.[39] Of course, racial discrimination by defendants is also forbidden by the Civil Rights Act of 1866, 42 U.S.C. §1981,

[38] "[T]he Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race." 347 U.S. at 499, quoting *Gibson* v. *Mississippi*, 162 U.S. 595, 591 (1866). The Senate Report on the 1972 amendments to Title VII concluded on the basis of *Bolling* that "[t]he prohibition against discrimination by the Federal government, based upon the Due Process clause of the Fifth Amendment, was judicially recognized long before the enactment of the Civil Rights Act of 1964." S.Rep. No. 92-415, 92nd Cong., 1st Sess. (1971) 13. The Fifth Amendment has been expressly held to bar federal discrimination in employment *Davis* v. *Washington*, 352 F.Supp. 187 (D.D.C. 1972) *aff'd*, 512 F.2d 956 (D.C. Cir. 1975), *petition for writ of certiorari pending*, No. 74-1492; *Faruki* v. *Rogers*, 349 F.Supp. 723 (D.D.C. 1972) (three judge district court).

[39] Section 7151 is no mere assertion of social goals; it is a direct and unequivocal command to the executive branch not to discriminate against petitioner because of his race. See *Henderson* v. *Defense Contract Administration*, 370 F.Supp. 180 (S.D.N.Y. 1973); *Morton* v. *Mancari*, 417 U.S. 535, 546 n.21 (1974).

infra, pp. 14-19, and by federal regulations and Executive Orders.[40]

The lower courts have held that mandamus is available to compel federal defendants to hire and promote without regard to race. *Beale* v. *Blount*, 461 F.2d 1133 (5th Cir. 1972); *Penn* v. *Schlesinger*, 490 F.2d 700, 704-05 (5th Cir. 1973), *reversed on other grounds*, 497 F.2d 970 (5th Cir. 1974); *Thorn* v. *Richardson*, 4 EPD ¶ 7630, at p. 5490 (W.D. Wash. 1971). At least since *Service* v. *Dulles*, 354 U.S. 363 (1957), this Court has recognized that federal personnel decisions are subject to judicial scrutiny. *Sampson* v. *Murray*, 415 U.S. 61, 71 (1974).

Mandamus is also available to enforce a ministerial duty to pay a particular sum of money to the plaintiff,[41] though

[40] Part 713, 5 C.F.R., implements, *inter alia*, a series of Executive Orders dating back to 1948. See E.O. 9980, July 26, 1948; E.O. 10590, January 18, 1955; E.O. 10925, March 6, 1961; E.O. 11246, September 24, 1965; E.O. 11478, August 8, 1969; E.O. 11590. Both part 713 and Executive Order 11478 establish that it is the policy of the government of the United States "to provide equal opportunity in federal employment for all persons, to prohibit discrimination in employment because of race," E.O. 11478, §1; 5 C.F.R. §713.202; and both provide that each executive department and agency "shall establish a program to assure equal opportunity in employment and personnel operations without regard to race." E.O. 11478, §2; C.F.R. Part 713.201(a).

[41] In *United States ex rel. Parish* v. *MacVeagh*, 214 U.S. 124 (1909), the Secretary of the Treasury had refused to pay the plaintiff $181,358.95, which payment was required by a special Act of Congress. This Court held that mandamus was available to compel the Secretary to issue a draft in that amount. 214 U.S. at 138. In *Miguel* v. *McCarl*, 291 U.S. 442 (1934), this Court held that mandamus was available to compel the payment of a pension unlawfully withheld by the Comptroller General and the Army Chief of Finance. In *Roberts* v. *United States ex rel. Valentine*, 176 U.S. 221 (1900), this Court upheld a writ of mandamus directing the Treasurer of the United States to pay interest on certain bonds issued by the District of Columbia. See also *Garfield* v. *United States ex rel. Goldsby*, 211 U.S. 249 (1908); *Work* v. *United States ex rel. Lynn*, 266 U.S. 161 (1924); *City of New York* v. *Ruckelshaus*, 358 F.Supp. 669 (D. D.C. 1973).

not to compel payment in an ordinary disputed tort or contract action. In the instant action plaintiff seeks, *inter alia*, an award of back pay. Were this a mere claim for consequential damages mandamus would be inappropriate. But the applicable regulations place upon defendants an express obligation to compute and award back pay in cases of racial discrimination, rendering the award of such back pay ministerial.[42] The mandatory nature of back pay awards under the regulation is somewhat more favorable to employees than the standard applied by courts in Title VII litigation, which involves a limited degree of discretion. *Albemarle Paper Co.* v. *Moody*, 43 U.S.L.W. 4880 (1975). If the district court finds discrimination, the defendants will have an absolute obligation to provide back pay, and that court can compel performance of that ministerial act by a writ of mandamus.[43]

[42] Section 713.271(b), 5 C.F.R., provides:

> *Remedial action involving an employee.* When an agency or the Commission, finds that an employee of the agency was discriminated against and as a result of that discrimination was denied an employment benefit, or an administrative decision adverse to him was made, the agency *shall* take remedial actions which *shall* include one or more of the following, but need not be limited to these actions:
>
> Retroactive promotion, with back pay computed in the same manner prescribed by §550.804 of this chapter, when the record clearly shows that but for the discrimination the employee would have been promoted or would have been employed at a higher grade, except that the backpay liability may not accrue from a date earlier than 2 years prior to the date the discrimination complaint was filed, but in any event, not to exceed the date he would have been promoted. (Emphasis added)

[43] The decisions of the Fifth Circuit in this regard may be divided. The panel in *Beale* held that back pay was awardable along with reinstatement in an appropriate case. 461 F.2d 1133, 1138. The original panel in *Penn* concluded that back pay was unavailable because it would "impinge upon the Treasury." 490 F.2d 700, 704-5, but the Fifth Circuit *en banc* adopted the decision of Judge Godbold which appears to permit back pay awards because of §713.271(b), 490 F.2d 700, 713-14; 497 F.2d 970.

Sovereign immunity is no obstacle to the award of relief by writ of mandamus. That defense to a mandamus action was raised and rejected long ago in *Marbury* v. *Madison*, 5 U.S. (1 Cranch), 137, 166, 170-171 (1803).[44] In addition to sanctioning mandamus actions against federal officials, section 1361 also authorizes mandamus against "any agency" of the United States, including in this case the defendant General Services Administration.[45] Certainly section 1361 constitutes a waiver of immunity in any action "in the nature of mandamus;" if it did not that provision would be a dead letter.

3. *The Tucker Act*

Section 1346, Title 28 United States Code, provides in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> • • •

[44] See *Clackamas County, Oregon* v. *McKay*, 219 F.2d 479, 488-496 (D.C. Cir. 1954), *vacated as moot*, 349 U.S. 909 (1955); *McQueary* v. *Laird*, 449 F.2d 608, 611 (10th Cir. 1971); Byse and Fiucca, "Section 1361 of the Mandamus and Venue Act of 1962" 81 Harv. L. Rev. 308, 340-42 (1967).

[45] That section 1361 authorized mandamus against an agency was well understood. Senator Mansfield, explaining the bill on behalf of the Judiciary Committee, stated that under it the court can only compel "the official or *agency* to act where there is a duty which the committee construes as an obligation, to act . . . As stated in the House report, the bill does not define the term 'agency,' but the committee agrees that it should be taken to mean any department, independent establishment, commission, administration, authority, board, or bureau of the United States, or any corporation in which the United States has a proprietary interest." 108 Cong. Rec. 18784. (Emphasis added)

> (2) Any other civil action or claim against the United States, not exceeding $10,000[46] in amount, founded either upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

This statute, known as the Tucker Act, is an express waiver of sovereign immunity as to claims within its scope,[47] and thus covers punitive and compensatory damages as well as back pay.

[46] The original Complaint contained no allegation as to the size of plaintiff's claim. The proposed Amended Complaint alleges that the amount "in controversy" exceeds $10,000, (A. 61a) but the United States denied that such an amount was at stake. Defendant's Memorandum In Opposition to Plaintiff's Motion to Amend, p. 4. If this Court were to determine that jurisdiction to award back pay and damages existed only under section 1346, plaintiffs would be entitled to waive recovery in excess of $10,000 and thus confer jurisdiction on the district court, and would do so. See *Perry* v. *United States*, 308 F.Supp. 245 (D.Colo. 1970), *aff'd* 442 F.2d (10th Cir. 1971); *Sutcliffe Storage & Warehouse Co.* v. *United States*, 162 F.2d 849 (1st Cir. 1947); *United States* v. *Johnson*, 153 F.2d 846 (9th Cir. 1946); *Hill* v. *United States*, 40 Fed. 441 (C.C. Mass. 1889); *Jones* v. *United States*, 127 F.Supp. 31 (E.D.N.C. 1954).

The standards for computing jurisdictional amounts under §1331 and §1346 are not the same, for §1331 alone authorizes injunctive relief. Thus, where the prospective value of the injunctive relief exceeded $10,000, but the monetary award was less than $10,000, jurisdiction would exist under both provisions. The same would be true where the combined value of the monetary and injunctive relief exceeded $10,000, or involved fundamental civil liberties of priceless value, so long as the dollar amount sought did not exceed $10,000. See 1 Moore's Federal Practice ¶ 0.96.

[47] *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951); *Spillway Marina, Inc.* v. *U.S.*, 445 F.2d 876 (10th Cir. 1971); *Lloyds' London* v. *Blair*, 262 F.2d 211 (10th Cir. 1958); *Union Trust Co.* v. *United States*, 113 F.Supp. 80 (D.D.C. 1953), *aff'd in part*, 221 F.2d 62, *cert. denied*, 350 U.S. 911.

Petitioner's claims clearly fall within the literal language of section 1346. Racial discrimination in federal employment is prohibited by the Fifth Amendment to the Constitution and by several statutes. See, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). An action is "founded upon" the Constitution whenever the damages are alleged to result from a violation of the Constitution; the plaintiff need not prove the Constitution expressly authorizes a lawsuit for that particular type of violation, since the Constitution itself contains no express authorization of litigation for violation of any of its provisions.[48] Similarly, an action is "founded upon" a federal statute if the government action complained of is a violation of that statute, regardless of whether the statute itself creates or contemplates a cause of action.[49] The lower courts have unanimously rejected the argument that an action under the Tucker Act can only be "founded upon" a federal statute which itself creates a remedy or

[48] See *Smith* v. *United States*, 458 F.2d 1231 (9th Cir. 1972) (Fifth Amendment); *United States* v. *Hvoslef*, 237 U.S. 1 (1915) (Article I, Section 9); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) (Fourth Amendment).

[49] Section 1346(a)(2) has long been construed to authorize actions to compel a refund of fines or penalties, on the ground that the propriety of the fine or penalty was governed by a federal statute. See *Carriso* v. *United States*, 106 F.2d 707 (9th Cir. 1939); *Compagnie General Transatlantique* v. *United States*, 21 F.2d 465 (S.D. N.Y. 1927), aff'd, 26 F.2d 195. *Spanish Royal Mail Line Agency, Inc.* v. *United States*, 45 F.2d 404 (S.D. N.Y. 1930); *Sinclair Nav. Co.* v. *United States*, 32 F.2d 90 (5th Cir. 1929); *Sultzbach Clothing Co.* v. *United States*, 10 F.2d 363 (W.D. N.Y. 1925); *Law* v. *United States*, 18 F.Supp. 42 (D. Mass. 1937); *Lancashire Shipping Co.* v. *United States*, 4 F.Supp. 544 (S.D. N.Y. 1933). Litigation under §1346 has been expressly sanctioned as "founded upon" a wide variety of other statutes which set the standard for government conduct, but contained no mention of any remedy. See, *e.g.*, *Beers* v. *Federal Security Administrator*, 172 F.2d 34 (2nd Cir. 1949) (Social Security Act); *Ross Packing Co.* v. *United States*, 42 F. Supp. 932 (E.D. Wash. 1942) (National Labor Relations Act); *Alcoa S.S. Co.* v. *United States*, 80 F. Supp. 158 (S.D. N.Y. 1948) (Transportation Act).

right of action.[50] In *United States* v. *Emery, Bird, Thayer R.R. Co.*, 237 U.S. 28 (1915), this Court held that an action to recover a tax was "founded upon" the Corporation Tax Law under which the tax was collected, although that tax provision contained no remedial provision. 237 U.S. at 31-32.[51]

Section 1346 covers "any claim" arising under the Constitution, statutes or regulations, and, while there are express exceptions,[52] they are not applicable to this case. See *Brooks* v. *United States*, 337 U.S. 49, 51 (1949). This construction of §1346 is supported by the interpretation given by the Court of Claims to the similarly worded provisions of 28 U.S.C. §1491. *Chambers* v. *United States*, 451 F.2d 1045 (Ct. Cl. 1971); *Allison* v. *United States*, 451

[50] *Aycock-Lindsey Corporation* v. *United States*, 171 F.2d 518 (5th Cir. 1948); *Compagnie General Transatlantique* v. *United States*, 21 F.2d 465 (S.D. N.Y. 1927); *Ross Packing Co.* v. *United States*, 42 F. Supp. 932, 937 (E.D. Wash. 1942).

[51] This action also arises under the Executive Order and regulation forbidding discrimination in federal employment. 5 C.F.R. §713; Executive Order 11478. In *Gnotta* v. *United States*, 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 397 U.S. 984, the court concluded that no action under the Tucker Act could be had to enforce the order and regulation on the ground that neither mentioned money claims, and "none of the executive orders or regulations . . . purports to confer any right on an employee of the United States to institute a civil action for damages against the United States." 415 F.2d at 1278. This reasoning is not correct. First, since the decision in *Gnotta* the regulations have been amended to authorize the award of back pay. Second, no mere regulation or Executive Order *could*, by itself, create a federal cause of action; only Congress has that power. Third, the reasoning in *Gnotta*—that an action can only be "founded upon" a regulation which itself creates a cause of action—is precisely the construction of the Tucker Act consistently rejected by all other federal courts.

[52] Section (d) provides: "The district courts shall not have jurisdiction under this section of any civil action or claim for a pension."

F.2d 1035 (Ct. Cl. 1971); *Pettit* v. *United States*, 488 F.2d 1026 (Ct. Cl. 1973). The decisions of the Court of Claims construing its own jurisdiction must be afforded substantial weight. See *Beale* v. *Blount*, 461 F.2d 1133, 1135 n.2 (5th Cir. 1972).

That back pay is available under the Tucker Act is made abundantly clear by its legislative history. Prior to 1964, §1346 expressly excluded from its coverage "[a]ny civil action or claim to recover fees, salary or compensation for official services of officers or employees of the United States." See, 28 U.S.C.A. §1346(d)(2) (1962). This exception was understood to preclude the award of back pay. *Jackson* v. *United States*, 129 F.Supp. 537 (D. Utah 1955). In 1964 this restrictive provision of Section 1346 was repealed. Pub. L. 88-519, 78 Stat. 699. The House Report,[53] the Senate Report,[54] and the congressional de-

[53] H. Rep. 1604, 88th Cong., 2d Sess., p. 2:

"The committee notes that by virtue of the act of October 5, 1962 (76 Stat. 744, 28 U.S. §1361), it is now possible for Government Employees who claim to have been improperly discharged to sue in their home districts for reinstatement. However, the present prohibition of subsection (d)(2) of section 1346, 28 United States Code makes it necessary for any claim for back pay to be brought in the Court of Claims. The committee believes that when the amount claimed as back pay is not more than $10,000, and is therefore within the monetary lin.it of the district courts' general jurisdiction of contract claims against the United States the issue of reinstatement and the issue of compensation should be susceptible of being disposed of in a single action."

[54] S.Rep. 1390, 88th Cong., 1st Sess., 2 U.S. Code Cong. and Admin. News (1964), p. 3255:

"Under the existing statutes, any officer or employee of the United States is required to file only in the Court of Claims here in Washington a civil suit to recover fees, salary, or compensation for services rendered as an officer or employee of the United States. By virtue of the act of October 5, 1962

bates[55] all agreed that the primary purpose of the change was to allow actions for back pay in the district courts.[56]

4. *28 U.S.C. § 1331*

Section 1331, 28 U.S.C., confers jurisdiction on the district courts in any action in which the sum in controversy

(76 Stat. 744, 28 U.S.C. 1361), it is now possible for Government employees who allege they have been improperly discharged to sue in their home districts for reinstatement, but under the prohibition of subsection (d) of 28 U.S.C., Section 1346, the employee's claim for back pay, which very frequently accompanies his claim for reinstatement, must be brought in the Court of Claims. Under the circumstances it is clear, that in order to do complete justice as efficiently and inexpensively as possible, the district courts should be given jurisdiction of the compensation claimed as well as the improper discharge, in order that they may be disposed of in a single action."

[55] 110 Cong. Rec. 19766 (Remarks of Sen. Keating):

"This bill will have its most salutary effect in employee discharge cases. Today, under a 1962 statute, a Government employee who claims to have been improperly removed from his position may sue to get his job back in his local federal court. But the subsection of the Judicial Code which the present bill would repeal today prevents the employee, if he succeeds in establishing his right to reinstatement from getting a judgment in the same action for the backpay to which he is also entitled. To get the back pay, he must either bring another suit in the Court of Claims or, in some instances, seek the additional relied administratively. Now, if this bill is finally approved, it will be possible for him to secure both reinstatement and complete monetary relief in single proceeding."

[56] Injunctive relief is not available under the Tucker Act. See *Clay* v. *United States*, 210 F.2d 686 (D.C. Cir. 1954); *Rambo* v. *United States*, 145 F.2d 670 (5th Cir. 1944), *cert. denied*, 324 U.S. 848; *Blanc* v. *United States*, 244 F.2d 708 (2d Cir. 1957).

District court jurisdiction under the Tucker Act to award back pay for employment discrimination was expressly upheld in *Palmer* v. *Rogers*, 6 EPD ¶8822, p. 5493 n. 1 (D.D.C. 1973).

exceeds $10,000[57] and which "arises under the Constitution, laws or treaties of the United States." The term "laws" is not limited to statutes, but includes any regulation or Executive Order with the force of law.[58]

Section 1331 thus confers jurisdiction over the individual defendants in this federal employment discrimination action[59] unless those individuals are protected from suit by the sovereign immunity of the federal government. At least since *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803) it has been clear that federal employees who act in excess of their authority or in violation of the Constitution enjoy no such immunity. This Court expressly rejected the suggestion that the Secretary of State could not be sued because he was a federal official:

> It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety . . . of issuing a mandamus is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation.
>
> But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular

[57] Regarding the allegation of jurisdictional amount, see n. 46, *supra,* p. 27.

[58] *Murphy* v. *Colonial Fed. Savings and Loan,* 388 F.2d 609 (2d Cir. 1967); *Farmer* v. *Philadelphia Elec. Co.,* 329 F.2d 3 (3d Cir. 1964).

[59] Several lower courts have sustained jurisdiction on this basis. See *e.g., Palmer* v. *Rogers,* 6 EPD ¶ 8822, p. 5493 (D. D.C. 1973); *Cortwright* v. *Resor,* 325 F.Supp. 797, 808 (E.D. N.Y. 1971).

> direction of the President and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

5 U.S. at 168.

The similar question of whether state sovereign immunity and the Eleventh Amendment bar a federal action against state officials has been similarly answered. In *Ex Parte Young,* 209 U.S. 123 (1908), the Attorney General of Minnesota urged the action was in effect one against the state, and thus barred by the Eleventh Amendment. This Court rejected this contention, and held that state officials could be enjoined from taking actions which would violate the Constitution:

> The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into

> conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

209 U.S. at 159-160. The limitation on the immunity of state officers delineated in *Ex Parte Young* is the same limitation applicable to federal officials. *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 621 (1912). See also *Dugan* v. *Rank*, 372 U.S. 609, 621-624 (1963); *Malone* v. *Baldwin*, 369 U.S. 643 (1962); *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 643 (1949).

If the action at issue is unlawful, it may be enjoined even though the activity may involve a large number of federal employees, substantial sums of money, or policies supported by high public officials. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). These cases were properly deemed suits against individuals rather than against the United States, not because the issues were unimportant, or the relief in some metaphysical sense "negative" rather than "affirmative", but because, since the activity challenged was unconstitutional, such activity was *ipso facto* not that of the sovereign.[60]

If, as alleged, the individual defendants did deny plaintiff promotions because of his race, they did so—not as agents of the United States cloaked with its immunity—but as private individuals on an unlawful and invidious

[60] The lower courts have consistently rejected out of hand contentions by the United States that its officers were protected by sovereign immunity when they act in violation of the Constitution or in excess of their statutory authority. *Wasson* v. *Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Toilet Goods Association* v. *Gardner*, 360 F.2d 677, 683, n. 6 (2d Cir. 1966) *aff'd*, 387 U.S. 158 (1967); *Berk* v. *Laird*, 429 F.2d 302, 306 (2d Cir. 1970).

enterprise of their own, and it is those individuals, not the plaintiff, who are interfering with the administration of official government policy. *Settle* v. *E.E.O.C.*, 345 F.Supp. 405 (S.D. Tex. 1972). Were this an action alleging racial discrimination in employment by a state, a defense of sovereign immunity would necessarily fail, for the Constitution places upon the states a legally enforceable obligation to hire and promote employees without discriminating on the basis of race.[61] "[I]t would be unthinkable that the same Constitution would impose a lesser duty on the federal Government." *Bolling* v. *Sharpe*, 347 U.S. 497, 500 (1954).[62]

Insofar as a complaint seeks damages against the individual defendants, it clearly states a cause of action under §1331. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 398 (1971). Government officials have no "executive immunity" from liability for injury caused by a bad faith act of discrimination in violation of federal law. *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).

[61] State officials practicing discrimination in employment have been repeatedly held to lack sovereign immunity. *Board of Trustees of Arkansas A & M College* v. *Davis*, 396 F.2d 730, 732 (8th Cir. 1968); *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971). Federal courts have consistently taken jurisdiction over litigation against state agencies and officials to resolve allegations of racial discrimination in hiring or promotion. See, e.g. *Carter* v. *Gallagher, supra; Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972); *N.A.A.C.P.* v. *Allen*, 340 F.Supp. 703 (M.D. Ala. 1972); *Johnson* v. *Cain*, 5 EPD ¶8509 (D. Del. 1973); *Suel* v. *Addington*, 465 F.2d 889 (9th Cir. 1972); *Bennett* v. *Gravelle*, 4 EPD ¶7566 (4th Cir. 1971); *Strain* v. *Philpott*, 4 EPD ¶¶7885, 7562, 7521 (M.D. Ala. 1971); *Morrow* v. *Crisler*, 479 F.2d 960, *modified on rehearing en banc*, 491 F.2d 1053 (5th Cir. 1974); *London* v. *Florida Department of Health*, 313 F.Supp. 591 (N.D. Fla. 1970), *aff'd*, 448 F.2d 655 (5th Cir. 1971).

[62] See also *Watkins* v. *Washington*, 3 EPD ¶8291, p. 6988 (D. D.C. 1971).

5. *Administrative Procedure Act*

Section 10(a) of the Administrative Procedure Act, 5 U.S.C. §702, provides in broad language that "[A] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." The instant action is within the literal language of the Administrative Procedure Act. Plaintiff is undeniably aggrieved by the refusal of the defendants to promote him. A refusal to promote plaintiff because of his race would be contrary to law,[63] arbitrary, capricious and in violation of his rights under the Fifth Amendment to the Constitution. 5 U.S.C. §706. The coverage of the Administrative Procedure Act is to be liberally interpreted.[64] The Administrative Procedure Act itself confers jurisdiction on the district court. *Rusk* v. *Cort*, 369 U.S. 367, 370, 372 (1962).[65] The "legal right" which plaintiff seeks to enforce need not be contained in a statute which

[63] "Law" clearly includes regulations. See e.g. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 417 ff. (1971).

[64] *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-141 (1967).

[65] Justice Brennan, concurring, concluded that the Administrative Procedure Act was a general grant of jurisdiction. 369 U.S. at 380, n. 1. Justice Harlan dissented on the ground that jurisdiction had been withdrawn by the Immigration and Nationality Act of 1952, but agreed that otherwise it would have been conferred by the Administrative Procedure Act. See 369 U.S. at 383-399.

See also *Citizens Committee for Hudson Valley* v. *Volpe*, 425 F.2d 97, 102-103 (2d Cir. 1970) cert. denied 400 U.S. 949 (1970); *Cappadora* v. *Celebrezze*, 356 F.2d 1, 5-6 (2d Cir. 1966); *Schicker* v. *United States*, 346 F.Supp. 417, 419 (D. Conn. 1972) modified on other grounds sub nom., *Schicker* v. *Romney*, 474 F.2d 309 (2d Cir. 1973); *Road Review League* v. *Boyd*, 270 F.Supp. 650, 651 (S.D.N.Y. 1967); *Harris* v. *Kaine*, 352 F.Supp. 769, 772 (S.D.N.Y. 1972); *Davis* v. *Romney*, 355 F.Supp. 29, 40-42 (E.D. Pa. 1973); *Northeast Residents Association* v. *Department of Housing and Urban Development*, 325 F.Supp. 65, 67 (E.D. Wisc. 1971); *Arrow Meat Company* v. *Freeman*, 261 F.Supp. 622, 623 (D. Ore. 1966).

establishes an independent basis of jurisdiction; it is sufficient that the statute was enacted to protect plaintiff's interests. *Norwalk Core* v. *Norwalk Redevelopment Agency*, 395 F.2d 920, 933 (2d Cir. 1968). The Act waives any immunity of the agencies whose conduct is subject to review.[66]

The Constitution, Acts of Congress, an Executive Order and federal regulations all strip the defendants of any discretion to discriminate, and this is not an area in which the agencies or Civil Service Commission have significant expertise.[67] Jurisdiction[68] is thus clearly appropriate under the Administrative Procedure Act.

[66] *Kletschka* v. *Driver*, 411 F.2d 436, 445 (2nd Cir. 1969); *Scanwell Laboratories Inc.* v. *Shaffer*, 424 F.2d 859-873-4 (D.C. Cir. 1970); *Estrada* v. *Ahiens*, 296 F.2d 690, 698 (5th Cir. 1969); *Adams* v. *Witmer*, 271 F.2d 29, 34 (9th Cir. 1959).

See also *National Helium Corporation* v. *Morton*, 326 F.Supp. 151, 154 (D. Kan. 1971) aff'd 455 F.2d 650, *Lombard Corporation* v. *Resoc*, 321 F.Supp. 687, 692-693 (D.D.C. 1970); *Schroede Nursing Care, Inc.* v. *Mutual of Omaha Inc. Co.*, 311 F.Supp. 405-409 (E.D. Wis. 1970). Other courts have reached the same result by arguing that, if the defendant individuals have acted unlawfully, the action is not one against the sovereign. See e.g. *National Helium Corporation* v. *Morton*, 455 F.2d 650 (10th Cir. 1971).

[67] See pp. 49-50, *infra*.

[68] Under the Tucker Act, the Mandamus Act, the 1866 Civil Rights Act and 28 U.S.C. §1331, it is clear that, as in a Title VII action, the district court is required to consider all available evidence, make an independent determination of whether there was discrimination, and formulate a remedy, regardless of what may have transpired in any administrative proceedings. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1972). Under the Administrative Procedure Act, a court's responsibility to "review" agency action may be the same or somewhat narrower, depending upon the nature of the claim. This issue—the nature of review under the Administrative Procedure Act in a federal employment discrimination action—need not be decided in this case.

B. Application of Section 717 to Discrimination Occurring Before March 24, 1972

The Second Circuit concluded that §717 applies to discrimination occurring before its effective date, March 24, 1972. P. 9a-13a. In the light of this Court's decision in *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974), petitioner believes that the holding of the Court of Appeals on this issue was correct. See *Place* v. *Weinberger*, No. 74-116.

C. Section 717 Did Not Repeal Pre-Existing Remedies for Discrimination in Federal Employment

Any inquiry into the meaning of section 717 must begin with an examination of Title VII as it applies to private employees, since section 717 was adopted by Congress for the express purpose of giving federal employees the same rights as are enjoyed by employees in the private sector.

Under section 717, the Senate report stated, "Aggrieved employees or applicants will also have *the full rights* available in the courts as one granted to individuals in the private sector under Title VII."[69] Senator Dominick, one of the draftsmen of the Senate version of §717(c), argued:

> A federal employee . . . would . . . have a right . . . to go into court himself in order to get a solution to his problem . . . It seems to me that where we are dealing with job discrimination, it makes no difference what type of job you have, you should be entitled to *the same remedies* anyone else has, and this is a right to have the federal court determine whether[70] or not you have been discriminated against.

[69] S.Rep. No. 92-415, pp. 16-17 (emphasis added).

[70] 118 Cong. Rec. 3967 (emphasis added).

Senator Williams, the floor manager of §2515, agreed

> Previously, there have been unrealistically high barriers which prevented or discouraged a federal employee from taking a case to court. This will no longer be the case. There is no reason why a federal employee should not have *the same private right of action* enjoyed by individuals in the private sector. . . .[71]

Accordingly the rights afforded a federal employee under Title VII must be at least as great as those provided to private employees.[72]

Even prior to the adoption of §717, it was well established that that Title had not in any way repealed or preempted

[71] 118 Cong. Rec. 4922 (emphasis added).

[72] Section 717(d) expressly provides that, in litigation by federal employees, the provisions of section 706(f) through (g), regulating private Title VII litigation, shall be fully applicable. Only three distinctions appear on the face of the statute in the treatment of federal and private employees: (1) During the 180 day period before a civil action may be commenced, a federal claim is processed by the defendant agency and Civil Service Commission rather than EEOC. Congress so provided, despite its conviction that the Civil Service complaint process was generally ineffective, solely because it concluded that giving this responsibility to EEOC would "impose an unmanageable burden on that overworked and underfunded agency." 117 Cong. Rec. 31718 (Remarks of Senator Kennedy) (1971). (2) Federal employees must file a civil action under Title VII within 30 days of receipt of a "right to sue" letter, whereas private employees, who prior to 1972 also had a 30 day limit, are now allowed 90 days within which to sue. See §707(f), 717(c). The legislative history is silent as to the reason for, or any recognition of, this difference. The time limit under 706(f) was changed at several times during the consideration of the 1972 Act, and the failure of the draftsmen to conform §717(c) to the final alteration may have been inadvertent. (3) Certain provisions of section 706 refer to actions of the EEOC rather than the Civil Service Commission or other agencies, and thus may be technically inapplicable to federal employees. See §§706(g), (f)(1).

42 U.S.C. §1981 or any other pre-existing statutes.[73] This Court subsequently[74] held in *Johnson* v. *Railway Express Agency*, 44 L.Ed. 2d 295 (1975), that Title VII had not repealed pre-existing statutes providing remedies to private employees for racial discrimination in employment.[75] Since Title VII did not repeal the section 1981 rights of private employees, it necessarily follows that Title VII did not repeal the section 1981 and other pre-existing rights[76] of federal employees.

---

[73] *Long* v. *Ford Motor Co.*, 496 F.2d 500, 503.04 (6th Cir. 1970); *Brady* v. *Bristol Meyers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Young* v. *International Telephone & Telegraph*, 430 F.2d 757, 760-764 (3d Cir. 1971); *Boudreaux* v. *Baton Rouge Marine*, 437 F.2d 1011, 1016-17 (5th Cir. 1971); *Sanders* v. *Dobbs Houses, Inc.*, 431 F.2d 1097, 1100-01 (5th Cir. 1970).

[74] Since the adoption of §717 two other circuits have rejected the pre-emption argument. *Waters* v. *Wisconsin Steel Works*, 427 F.2d 476, 484-85 (7th Cir. 1970); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 993-996 (D.C. Cir. 1973).

[75] "Despite Title VII's range and its design as a comprehensive solution for the problem of individious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief." Similarly in *Alexander* v. *Garden-Denver Co.*, 415 U.S. 36 (1974) this Court held:

> [L]egislative enactments in this area have long envinced a general intent to accord parallel or overlapping remedies against discrimination . . . . Moreover, the legislative history of Title VII manifests a Congressional intent to allow an individual to pursue his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.

415 U.S. at 47.

[76] The other statutes establishing the rights of federal employees to maintain civil actions in the district courts are set out *supra*, pp. 22-38. In addition, 28 U.S.C. §1491 confers jurisdiction on the Court of Claims over claims of racial discrimination in federal employment. See *Allison* v. *United States*, 451 F.2d 1035 (Ct. Cl. 1971).

Section 717 on its face contains no express repeal of any pre-existing statute. On the contrary, section 717(c)[77] provides

> Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure non-discrimination in employment as required by the Constitution *and statutes* or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government. (Emphasis added)

The Second Circuit suggestion that section 717 tacitly repealed all pre-existing remedies encounters

> head-on the "cardinal rule . . . that repeals by implication are not favored." . . . The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give the effect to both if possible. . . . The intention of the legislature to repeal 'must be clear and manifest.'"

Morton v. *Mancari*, 417 U.S. 535, 549, 551 (1974) Congress added the remedy in section 717, not because it thought existing remedies unduly harsh or excessive, but because it felt they had been "ineffective for the most part." *Id.*, p. 546. That Congress thus provided federal employees with independent overlapping remedies for racial discrimination is consistent with the general policy of providing

---

[77] 42 U.S.C. §2000e-16(c).

such a variety of remedies for the protection of important civil rights.[78]

Congress has repeatedly and expressly rejected proposals to make Title VII the exclusive remedy for claims of racial discrimination in employment. In 1964 Senator Tower proposed an amendment making Title VII the exclusive remedy for discrimination in employment. The amendment was defeated on the floor of the Senate. 110 Cong. Rec. 13650-52. In 1972 Senator Hruska proposed an amendment which would have made Title VII the exclusive remedy for claims of employment discrimination. The amendment was opposed by the Department of Justice[79] and defeated on the Senate floor.[80] A similar proposal was rejected by the House Labor Committee.

[78] *Employment: Alexander* v. *Gardner-Denver*, 415 U.S. 36 (1974). *Housing:* 42 U.S.C. §3612, et seq. and 42 U.S.C. §1982; *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 416-17, n. 20 (1968); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 240 (1969). *Places of Public Accommodation:* 42 U.S.C. §2000a and 42 U.S.C. §1981; *Tillman* v. *Wheaton-Haven Rec. Assoc.*, 410 U.S. 431 (1973). *Voting:* 42 U.S.C. §1983 and 42 U.S.C. §1971(c); *Brooks* v. *Marcelli*, 331 F.Supp. 1350, 1352, n. 5 (E.D. Pa. 1971) (statutes authorizing suits by the Attorney General alleging violations of the 1957 Voting Rights Act did not repeal private cause of action under §1983).

[79] Hearings Before a Subcommittee of the Senate Committee on Labor and Public Welfare, 91st Cong. 1st Sess. 162-163 (1971). The testimony was quoted at length in the Senate debates. 118 Cong. Rec. 3369-70.

[80] In opposing the Hruska Amendment, Senator Javits argued:

"There are other remedies, but those other remedies are not surplusages. Those other remedies are needed to implement the promise we made under the Constitution to prevent discrimination in employment. The laws of 1866, 1871, as well as the law of 1964 are to implement that promise. . . . Mr. President, the key to the proposition which we laid before the Senate—incidentally, this has now been the law for the last 8 years—is that what this amendment would seek to do is cancel away much of that law. It seems to me that should not be the attitude of the Senate, in face of the fact, as I say, that employees are not fully protected by the exclusive remedy which is sought to be compelled by this amendment." 118 Cong. Rec. 3761-62. See also 118 Cong. Rec. 3371-72 (Remarks of Senator Williams) ("I believe that to make Title VII the exclusive remedy for employment discrimination would be inconsistent with our entire legislative history of the Civil Rights Act.")

The coverage of section 717 is clearly not coextensive with that of section 1981 and other pre-existing legal remedies. The statutes differ both as to relief available[81] and as to employees covered.[82] These earlier statutes provide for relief not necessarily available under Title VII. For these reasons it is apparent that section 717 and pre-existing statutes are not "irreconcilable" but complement one another and provide a diverse arsenal of remedies for an aggrieved federal employee.[83]

[81] Under section 1981 and section 1331 an employee would be entitled in appropriate circumstances to punitive or compensatory damages against the government officials individually. Such damages would also be awardable against the agency itself under section 1981 and the Tucker Act. Under remedies other than Title VII, particularly section 1981, a federal employee would not be subject to the limited exhaustion requirement of section 717(c). Section 717 has several advantages over alternative statutes: it provides for awards of attorneys' fees, court appointed counsel, and waiver of court costs, features which we may presume are particularly important to aggrieved federal employees of limited resources. Title VII's two year limitation on back pay, if applicable to the federal government, would not restrict the back pay available under any of the pre-existing remedies.

Section 706(g) provides that back pay liability shall not accrue "from a date more than two years prior to the filing of a charge with the Commission." A federal employee, however, does not file a charge with the E.E.O.C. but with his own agency or the Civil Service Commission. Whether such a limitation should nonetheless be imposed in federal cases because of the congressional policy of treating federal and private employees similarly under Title VII is a question not presented in this case.

[82] Section 717 does not cover aliens employed outside the limits of the United States, employees of the Government Accounting Office, and persons in the Government of the District of Columbia and the legislative and judicial branches who are not in the competitive service.

[83] Title VII, sections 1981 and 7151, Executive Order 11478, 5 C.F.R. part 713 and the Fifth Amendment, which bar dis-

In *Morton* v. *Mancari, supra,* the appellees urged that section 717, proscribing racial discrimination in government employment, had repealed *sub silentio* the provisions of the Indian Reorganization Act of 1934,[44] which established an employment preference for qualified Indians in the Bureau of Indian Affairs. Despite the apparent conflict between the provisions of the two statutes, this Court held that section 717 had not repealed the earlier law. If section 717 did not tacitly repeal an apparently inconsistent substantive rule, it follows *a fortiori* that it did not repeal pre-existing remedies enforcing the same substantive prohibition against racial discrimination established by section 717 itself.

II.

This Action Should Not Be Dismissed For Failure To Exhaust Administrative Remedies.

Petitioner maintains that an aggrieved federal employee should not be required to exhaust administrative remedies before invoking his independent statutory remedies. Even if the Court concludes that such exhaustion should generally be required, it was improper to dismiss the instant action because, *inter alia,* (1) the administrative agency had already exceeded by a year the legal deadline for processing discrimination complaints, (2) petitioner was not afforded a hearing on his claim that further exhaustion would have been futile, and (3) when an employee has failed to adequately exhaust, the district court should not dismiss the action but should issue an appropriate stay of judicial proceedings while exhaustion is completed.

---

crimination in federal employment, necessarily bar any reprisals by federal officials for the filing of complaints alleging such discrimination.

[44] 25 U.S.C. §461.

A. Exhaustion of Administrative Remedies Is Not a Prerequisite To An Action Under The 1866 Civil Rights Act, etc.

In the instant case petitioner took all steps necessary to apply for a promotion to GS-9, which was denied June 27, 1971.[45] The question presented is whether, prior to maintaining a non-Title VII action, he was also required to collaterally attack the decision of June 27 by invoking the procedures established by 5 C.F.R. part 713. The decision as to whether to require exhaustion depends upon the nature of the claim and "the particular administrative scheme at issue." *Weinberger* v. *Salfi,* 43 U.S.L.W. 4985, 4990 (1975). Even where a statutory scheme expressly requires exhaustion, this Court has permitted resort to the courts without complete exhaustion under appropriate circumstances. See e.g. *McKart* v. *United States,* 395 U.S. 185 (1969); *Weinberger* v. *Weisenfeld,* 43 U.S.L.W. 4393 (1975). Unlike Title VII, neither the 1866 Civil Rights Act nor the other statutes relied on by petitioner contain any express exhaustion requirement.[46] This Court should "not engraft on the statute[s] a requirement that may inhibit the review of claims of employment discrimination in the federal courts." *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 799 (1973).

---

[45] This is not a case in which an employee sued over a promotion for which he had never applied. Compare *McGee* v. *United States,* 402 U.S. 479 (1971).

[46] Section 704 of the Administrative Procedure Act requires under certain circumstances that the agency action attacked be "final." This is a general requirement of ripeness, not mechanical exhaustion, and has been applied "in a pragmatic way" considering both the nature of the issue and the burden on the parties. *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 148-150 (1967).

1. *Independent Remedies*

The question of exhaustion, like that of implied repeal, must be resolved primarily with reference to the rights of private employees under similar circumstances.[87] For federal and private employees alike, "[t]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 30, 48 (1974). Precisely because of the independent nature of these remedies a private employee is not required to invoke them in any particular order. A private employee need not, for example, exhaust his Title VII administrative remedies before filing a §1981 action—indeed, under certain circumstances he may not so delay commencing his §1981 action. *Johnson* v. *Railway Express Agency*, 44 L.Ed. 2d 295 (1975). This comports with the general rule that the exhaustion of state administrative remedies is not a prerequisite to civil rights litigation in the federal courts.[88]

Federal employees should not be subjected to the burden of an exhaustion requirement from which all state and private employees are immune. A federal employee is afforded a comparable arsenal of independent remedies, and he is free to choose whether to invoke §1981, the Tucker Act, the Mandamus Act, etc. The administrative complaint procedure established by 5 C.F.R. part 713 is another such administrative remedy available to a federal employee which he can choose to invoke when he concludes it is the best course. Congress has to a limited extent required an

[87] See pp. 38-39, *supra*.

[88] *Damico* v. *California*, 389 U.S. 416 (1967); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963); *Monroe* v. *Pape*, 365 U.S. 167 (1961).

employee to use this administrative remedy before filing a Title VII action,[89] but no such precondition is placed on actions under other statutes.

The creation of the E.E.O.C. administrative remedy by Title VII for state and private employees has been held not to reflect a Congressional requirement that all private compaints be processed there first. That reasoning applies *a fortiori* to section 717(c), which did not create the administrative remedy but was intended instead to *limit* any obligation to use that already existing procedure and does not involve problems of comity.[90] This independence of remedial schemes is consistent with the decisions of this Court in construing the civil rights acts to give "due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims". *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967).

The reasoning of *Johnson* v. *Railway Express Agency*, 44 L.Ed. 2d 295 (1975), rebuts the suggestion of the Second Circuit that a federal employee not only can but must so delay his §1981 action pending exhaustion. In a number of states, including that involved in *Johnson*, the statute of limitations applicable to a §1981 case is one or two

[89] The employee need not process his claim all the way through the Appeals Review Board, or even await final agency action; he may commence suit if final agency action has not occurred within 180 days of filing his administrative complaint. Section 717(c). A majority of all administrative complaints are not decided within 180 days, despite an express requirement in §713.220 that they be resolved in that time.

[90] "[T]he policies behind the requirement of exhaustion of state administrative remedies are even stronger than those requiring exhaustion of federal administrative remedies, because of comity considerations. Thus if state exhaustion is not required, *a fortiori*, exhaustion of federal remedies should not be required." *Penn* v. *Schlesinger*, 490 F.2d, 700, 707 (5th Cir. 1974) (Morgan, *J.*, Concurring), rev'd 497 F.2d 970 (5th Cir. 1974).

years.[91] Petitioner's case, however, was already 19 months old when final agency action occurred, and doubtless would have aged still further pending an appeal to the Appeals Review Board.[92] Particularly in view of the severe limitations on the types of claims that may be processed under the Civil Service Regulations,[93] it is unlikely that there will be a "complete identity of the causes of action" considered in that process and raised in the §1981 action. 44 L.Ed. 2d at 306, n. 14. In view of the policy that federal and private employees be treated alike, a federal employee should not be compelled to endure a delay before filing a §1981 action under circumstances which, if acquiesced in by a private employee, could be characterized as sleeping on his rights.

The administrative and judicial processes might prove complementary if an employee chooses to pursue them simultaneously. A section 1981 action would entitle the employee to invoke discovery procedures, which are essential to unearth the facts but which are not available in the administrative process. The administrative process, on the other hand, may involve opportunities for conciliation, *e.g.*, through the efforts of the E.E.O. Counselor.[94] The employee would be free to seek to stay or accelerate the judicial proceeding to dovetail with activities in the

[91] Code of Ala., Title 7, §5526 (1 year); Tenn. Code Anno., §28-304 (2 years); Code of S.C., §10-146 (2 years); Anno. Code of Cal., §1422 (2 years); Vernon's Anno. Texas Revised Civil Statutes, Art. 5526 n. 193.5 (2 years).

Petitioner's complaint was filed within the 3 year New York statute of limitations. Civil Practice Law and Rules, §214.

[92] The regulations place no limitation on the amount of time the Board may delay before deciding an appeal.

[93] See pp. 53-54, *infra*, p. 43, *supra*.

[94] 5 C.F.R. §713.213.

administrative process. See *Johnson* v. *Railway Express Agency*, 44 L.Ed. 2d at 304.[95]

2. *Purposes of Exhaustion*

This Court has delineated criteria which must be considered in determining if exhaustion is to be required, including whether agency expertise or agency discretion are required, whether exhaustion is needed to permit an agency to learn the relevant facts or corerct its mistakes, and whether resort to the administrative process is likely to be futile. *McKart* v. *United States*, 395 U.S. 185, 194-5 (1969); *Weinberger* v. *Salfi*, 43 U.S.L.W. 4985, 4990 (1975); *Weinberger* v. *Weisenfeld*, 43 U.S.L.W. 4393, 4395, n. 8 (1975). These factors militate against requiring exhaustion in federal employment discrimination cases.

The agencies have no particular expertise to offer. The issue is not a matter of ordinary personnel management, but of unlawful discrimination. Congress expressly concluded in 1972 that the Civil Service Commission itself was lacking in such expertise.[96] After 10 years of employment discrimination litigation the federal courts are considerably more expert in the applicable legal problems than personnel officials inside or outside government.[97] The

[95] A court could not impose such a stay over the objection of the employee, since to do so would be the equivalent of establishing an exhaustion requirement. Cf. *Grubbs* v. *Butz*, 514 F.2d 1323 (D.C. Cir. 1975).

[96] Both the House and Senate Reports noted that the Commission "has been plagued by a general lack of expertise in recognizing and isolating the various forms of discrimination within the system." H.R. Rep. No. 92-238, p. 24; S. Rep. No. 92-415, p. 15.

[97] The pre-eminent example of this expertise is the area of testing, where the courts have invalidated as not job-related standardized tests in widespread industrial use. See *Griggs* v. *Duke Power Co.*, 461 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, 43 U.S.L.W. 4880 (1975).

government officials who process these complaints are ill equipped to deal with the complex law that has grown up in the area; the regulations do not require that the officials involved be attorneys, and the instruction manuals are largely devoid of reference to applicable court decisions. Even among the decisions of the Appeals Review Board, reliance on or citations to the law as announced by federal courts is virtually non-existent.[28] Frequently the processing of discrimination complaints is in the hands of officials whose primary duties lie elsewhere. Clearly these officials have far less expertise than the E.E.O.C., yet the courts do not, out of deference to the E.E.O.C., delay action in a §1981 case or give weight to its determinations in a particular case. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

This is not an area in which the agencies may properly be said to have any discretion. Once the facts are established, the conclusions and remedy follow as a matter of law. See *McKart* v. *United States*, 395 U.S. 185 (1969); *Albemarle Paper Co.* v. *Moody*, 43 U.S.L.W. 4880 (1975). The resolution of those statutory and constitutional issues "is a primary responsibility of the courts, and judicial construction has proved especially necessary" with respect to §1981, whose broad language frequently can be given to meaning only by reference to public law concepts. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). Agency discretion seems particularly inappropriate in a case of alleged discrimination, for it is a claim which calls into question the motives of the very agency officials deciding the case. Compare *Glover* v. *St. Louis, etc., R.R.*, 393 U.S. 324, 331 (1969). It is particularly for this reason that the courts must be regarded as the forum "for the ultimate resolution of discriminatory employment claims."

[28] See n. 102, *infra*, p. 52.

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36, 60, n. 21 (1974).

Nor is this the type of case in which exhaustion is necessary to permit the agency to develop a factual record. That principle is applicable to a situation such as a rate making case, where the relevant evidence is in the possession of the plaintiff and the agency uses its power and expertise to develop a record. In an employment action, however, the relevant evidence is almost entirely in the possession of the defendant agency, which clearly does not need an administrative proceeding to learn what its records and employees would reveal. The plaintiff needs that information, but he usually cannot rely on the administrative process to develop a factual record, because there are no provisions whatever for discovery. Compare *Renegotiation Board* v. *Bannercraft Co.*, 415 U.S. 1, 24, n. 23 (1974).

This Court has long recognized that exhaustion should not be required where there is no reasonable chance that the administrative proceedings will result in a decision favorable to the complainant. *Weinberger* v. *Salfi*, 43 U.S.L.W. 4985, 4990 (1975). Congress concluded in 1972, after extensive hearings, that the administrative complaint process had proved "ineffective for the most part," and "had impeded rather than advanced the goal of the elimination of discrimination in Federal employment." [29] The Civil Rights Commission concluded in 1975 that the Civil

[29] H. Rep. No. 92-238, pp. 23-24, stated:

> A critical defect of the federal equal employment program has been the failure of the complaint-process. That process has impeded rather than advanced the goal of the elimination of discrimination in Federal employment. The defect, which existed under the old complaint procedure, was not corrected by the new complaint process. The new procedure, intended to provide for the informal resolution of complaints, has, in practice denied employees adequate opportunity for impartial investigation and resolution of complaints.

Service "Commission's regulations governing complaint procedures by agencies deny Federal employees a full and fair consideration of their employment discrimination grievances." [100] The Civil Rights Commission found that the administrative process was biased against the aggrieved employee for a wide variety of reasons, including: (1) the failure of the agencies and the Appeals Review Board to follow Title VII law; (2) unreasonable time and other technical limitations on administrative complaints; (3) effective refusal to process class action allegations; (4) control of the entire investigation and decision process by the defendant agency;[101] (5) inadequate instructions to investigators.[102] The Commission found that, in Fiscal 1973, although federal employees made

---

Under the revised procedure, effective July 1, 1969, the agency is still responsible for investigating and judging itself. Although the procedure provides for the appointment of a hearing examiner from an outside agency, the examiner does not have the authority to conduct an independent investigation. Further, the conclusions and findings of the examiner are in the nature of recommendations to the agency head who makes the final agency determination as to whether discrimination exists. Although the complaint procedure provides for an appeal to the Board of Appeals and Review in the Civil Service Commission, the record shows that the Board rarely reverses the agency decision.

The system, which permits the Civil Service Commission to sit in judgment over its own practices and procedures which themselves may raise questions of systemic discrimination, creates a built-in conflict-of-interest.

See also, S.Rep. No. 92-415, p. 14.

[100] United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort—1974, v. 5, p. 621 (July, 1975); p. 31aa. The relevant portions of the Report are reprinted in Appendix B to this brief.

[101] Compare *Glover* v. *St. Louis, etc., RR.*, 393 U.S. 324, 331 (1969).

[102] United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort—1974, v. 5, pp. 61-86, 619-24, 655-59, pp. 3aa-39aa.

26,627 informal complaints to E.E.O. Counselors, and filed 2,743 formal written complaints, only 22 federal employees received back pay or retroactive promotions.[103] It is readily apparent from the Commission's Report that for a federal employee aggrieved by racial discrimination resort to the administrative process is futile.

There are, moreover, a wide variety of complaints cognizable in court for which the regulations do not authorize relief. The agency will not give relief for discrimination occurring more than 30 days before the complaint process is begun, even if a continuing violation is involved.[104] Thus, although petitioner's administrative complaint alleges a continuing policy of discrimination since 1967,[105] petitioner could not win complete relief in the administrative process, since the agency could not give him back pay or other relief for the period before June, 1971. In the courts, however, the statutes of limitations are far longer[106] and, where a continuing violation is involved, relief is not limited by such statutes. Monetary compensation under the regulations is limited to back pay,[107] but under the Tucker Act and the 1866 Civil Rights Act petitioner would be entitled under appropriate circumstances to compensatory or punitive damages against the agency, and, under the 1866 Act and §1331, against the individual defendants. Thus, even if petitioner were to "prevail" in the administrative process, he still could not receive all the relief to which he

---

[103] Id., pp. 67, 85; pp. 9aa, 27aa.

[104] 5 C.F.R. §713.214; United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort—1974, v. 5, pp. 65-66, pp. 7aa-8aa.

[105] Appendix, p. 15a.

[106] The New York statute of limitations is 3 years, 36 times as long as the 5 C.F.R. §713.214 limitation.

[107] 5 C.F.R. §713.271.

might be entitled in court. Moreover, because the burden of proof placed on an employee in the administrative process is far more stringent than that applied by the courts, the same evidence which would be deemed insufficient by the agency could, in a court of law, compel judgment for the employee.[108] In addition, there are a variety of possible technical defects which would doom an administrative complaint to rejection, but would in no way limit the jurisdiction or power of a court to grant relief.[109]

The issue presented by this case is *not* whether federal agencies will be precluded from investigating or remedying unlawful discrimination because an employee filed a lawsuit rather than pursuing an administrative complaint. No statute, regulation or Executive Order forbids any federal official from stopping or remedying discrimination merely because an administrative complaint has not been filed or pursued. On the contrary, section 717(e), section 7151, and the Civil Service Commission Regulations[110] require supervisory officials to investigate, stop and fully remedy any problem of investigation regardless of whether an administrative complaint has been filed. Compare *Christian* v. *New York Department of Labor*, 414 U.S. 614, 624, n. 10 (1974). This responsibility reflects the fact that, in our

---

[108] See United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort—1974, v. 5, pp. 78, 84; pp. 20aa, 26aa.

[109] Id., pp. 65-69; pp. 7aa-11aa. In Fiscal 1974 10 percent of all administrative complaints were rejected on such technicalities.

Petitioner maintains that each of these limitations and defects in the administrative process is unlawful; whether they are in fact invalid is a question not presented by this case.

[110] 5 C.F.R. §713.203. Any regulation which required or even permitted agency officials to tolerate discrimination in the absence of a well pleaded administrative complaint would, of course, be invalid.

constitutional scheme, racial discrimination is not a minor personal inconvenience but a violation of fundamental national policies. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). The law requires the federal government, as it does private employers, "to self-examine and self-evaluate their employment practices, and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle Paper Co.* v. *Moody*, 43 U.S.L.W. 4880, 4884 (1975).

In the ordinary course of things an agency or its officials, acting *sua sponte* after the commencement of a lawsuit, would be able to resolve any problem of discrimination well before a court could actually set the matter for trial, benefiting directly from any discovery in that proceeding. The plaintiff employee would of course cooperate with any such investigation and the process would not need to differ significantly from the administrative complaint procedure in which the prime movant and investigator is supposed to be the agency itself. In *Penn* v. *Schlesinger*, however, the government suggested that, although the most virulent form of discrimination might well be practiced at Maxwell Air Force Base, and although officials there might be systematically breaking the law, there was nothing that the Secretary of Defense or anyone else could do unless Mr. Penn would drop his lawsuit and file an administrative complaint. See *Penn* v. *Schlesinger*, 490 F.2d 700, 706 (5th Cir. 1973); 497 F.2d at 975-76 (5th Cir. 1974). That contention is not merely wrong, it reflects an attitude which underlies the whole problem of exhaustion. If federal officials had recognized that they had an independent responsibility to assure non-discrimination, the agencies involved would *sua sponte* have long ago completed their consideration of these problems of discrimina-

tion, and the exhaustion issue in this case and *Penn* would be moot.

3. *Other Policy Considerations*

A variety of other considerations militate against an exhaustion requirement in federal employment discrimination cases.

In terms of futility alone, any exhaustion rule would be honeycombed with exceptions. A very substantial portion of all employees would be able to establish that some or all of their complaint would not stand a reasonable chance of success. Any relevant allegation of futility would require an evidentiary hearing of potentially vast scope.

The futility or efficacy of the administrative process would necessarily vary from agency to agency and over time. In a case such as this, where petitioner challenges the efficacy of taking discrimination appeals to the Appeals Review Board, a detailed inquiry as to the workings and record of the Board would be necessary. A decision after any such inquiry would not be *res judicata* as to other employees, and would apply as a matter of collateral estoppel against the agency or Board only until its practices materially changed. Manifestly the time consumed in adjudicating exhaustion questions would easily exceed the judicial efforts that might be saved by an exhaustion requirement. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 59 (1974).

If an exhaustion rule were applied to these cases, the courts would be obliged to decide, not only whether to require exhaustion in each case, but what steps were necessary to exhaust. A federal employee aggrieved by employment discrimination may find his complaint covered by several of the nine overlapping and inconsistent administrative procedures.[111] The regulations provide no guidance as to how to proceed in such a situation.[112] Within each procedure there are a variety of ways in which an employee can process his complaint; he must decide what issues to raise in the complaint, whether to demand a hearing, etc. Congress in 1972 concluded that, where federal employees were confronted by a government defense of failure to exhaust administrative remedies, there is "no certainty as to the steps required to exhaust such remedies".[113] The time and energies of the lower courts are already being consumed by government arguments that aggrieved employees chose the wrong administrative process.[114] Those judicial resources would be far better spent deciding these cases on the merits than resolving scholastic controversies about the "correct" way to exhaust.

---

[111] These include (a) charges of reprisal, 5 C.F.R. §713.261-.263, (b) third party complaints, 5 C.F.R. §713.251; (c) allegations of discrimination in an adverse action proceeding, 5 C.F.R. §772.306; (d) appeal from termination of a probationary employee, 5 C.F.R. part 315; (e) challenge to Civil Service Commission job requirements, 5 C.F.R. §300.103-.104; (f) appeals from a reduction in force, 5 C.F.R. part 351; (g) a grievance proceeding, 5 C.F.R. part 771; (h) appeal from a reduction in grade, 5 C.F.R. part 532; (i) a simple allegation of discrimination, 5 C.F.R. part 713.

[112] Notwithstanding 5 C.F.R. §713.219, the general practice is to require federal employees to make an election of administrative remedies, and to do so without any explanation as to the procedural and substantive consequences of the choice.

[113] S. Rep. No. 92-415, 92nd Cong., 1st Sess. p. 16.

[114] See e.g. *McHoney* v. *Callaway*, No. 74-C-1729 E.D. N.Y. (government contends employee erred by invoking adverse action process rather than §713); *Swain* v. *Callaway*, 5th Cir. No. 75-2002 (government contends employee erred by failing to demand an administrative hearing); *McLaughlin* v. *Callaway*, No. 74-1237, S.D. Ala. (government contends employee erred by filing an ordinary administrative complaint rather than a third party complaint).

Exhausting administrative remedies often poses a serious burden on the employee. Where the employee is seeking a promotion or a job, or a substantial award of back pay, the delay may well mean that the essential needs of the employee and his family will go unmet. If the employee wants to pursue the administrative process seriously and thus retains an attorney, the out of pocket cost will be substantial compared to the income of ordinary civil servants, and regulations do not provide for awards of counsel fees even if he wins.[115] The time and effort which must be expended on the administrative complaint may be substantial.

There are, to be sure, a variety of reasons why an employee would want to resort to the administrative process *if* it offers a reasonable chance of success—it is less expensive, less formal, and less time consuming than an ordinary court case. Given these advantages, and the possible forfeiture of his Title VII rights,[116] an employee would be foolhardy to abandon the administrative route so long as there is a meaningful chance that he can obtain there the relief he seeks. *McKart* v. *United States*, 395 U.S. 185, 200 (1969). But there are situations in which such a meaningful chance of success does not exist, and the minute possibility is far outweighed by the burdens on the employee. In such circumstances the employee ought, in all fairness, to have immediate access to the courts.

---

[115] Petitioner maintains the absence of such a provision is unlawful, and that a prevailing employee would be entitled to a court award for counsel retained in connection with the administrative proceeding.

[116] If an employee sued under §1981 without ever filing an administrative complaint he could not invoke section 717. If the employee filed a complaint but sued before both final agency action and the passage of 180 days, his section 717 right to sue would accrue on the occurrence of either event and he could then add that basis of jurisdiction to his complaint.

The question is whether an employee or the Court should decide whether those circumstances are present. The employee knows the internal workings of the agency, the fate of past complaints, the attitudes of officials who will decide the case, the influence of the defendant supervisors, and the extent to which his complaint is within the scope of the administrative remedies, and he is particularly aware of the burden that further administrative proceedings would impose on him in terms of time, effort, the cost of an attorney, and the delay until relief is finally awarded. The employee's self-interest will preclude abandoning the administrative process except where it is clearly futile or unreasonable delay has occurred. There is no reason to believe that a federal judge, unfamiliar with the processes and history of the agency, unaffected by the burdens of further delay, and preoccupied with the problem of reducing his docket, would better able to make this judgment than the employee.[117]

The very requirement of exhaustion may tend to undermine the effectiveness of the administrative process. Under the applicable regulations the employee has a great degree of control over the nature of the process and, consequently,

---

[117] It is noteworthy that, in section 717, Congress gave the employee broad discretion to decide when it was in his interest to continue in the administrative process. At any time 180 days after filing a complaint or after filing an appeal, and after final agency action, the employee can choose to pursue that process or to file a civil action. The employee's decision is, of course, binding on the court, which has no authority to require further administrative proceedings but must itself hear the case as expeditiously as possible. *Grubbs* v. *Butz*, 514 F.2d 1323 (D.C. Cir. 1975).

Similarly, if a federal employee's claim is like or related to that of second employee who files a class action under section 717, the first employee may participate in that section 717 class action without filing an administrative complaint, or may choose to file such a complaint in addition to or instead of participation in the class action.

over how long it will take. If an employee insists on a detailed investigation, provides the investigator with much information,[118] negotiates at length on the basis of the investigation,[119] asks for a full hearing,[120] asks for his own witnesses to be called for such a hearing and subjects other witnesses to lengthy cross examination, and, if unsuccessful, files a substantial brief with the Appeals Review Board, both the agency and Board action will doubtless take longer and far exceed the 180 limit. If, on the other hand, the employee believes the administrative process is futile and knows he has to complete it before suing, he can substantially abbreviate it by waiving various aspects of the process. An exhaustion requirement would tend to force an employee to follow the latter course, and thus decrease the likelihood of any favorable administrative ruling and increase the probability that judicial intervention will be required.

So long as every employee is required to go through that process, the agency has no incentive to make the process either expeditious or fair. On the contrary, a process replete with delays and heavily biased against the employee serves the dual purpose of postponing the day when the agency is brought into court and of so discouraging and exhausting the complainant that he is unlikely to sue. Such seems to have been the effect in recent years of the agency assumption that exhaustion is required. In 1972 Congress clearly identified a wide range of defects in the administrative process and mandated the Civil Service Commission to reform it. Since then, however, virtually none of the problems Congress identified have been solved, and the regulations which Congress found

[118] 5 C.F.R. §713.216.

[119] 5 C.F.R. §713.217(a).

[120] 5 C.F.R. §713.217(c).

totally inadequate remain largely unchanged.[121] This situation may be a direct result of the belief by the Commission and agency officials that employees would have to suffer through the administrative process no matter how bad it might be. In the long run, of course, this means that fewer cases will actually be remedied in the administrative process and that more aggrieved employees will end up in court.

The absence of an exhaustion requirement, however, would create the incentive for reform that has heretofore been missing. The Commission and affected agencies would naturally prefer that complaints of discrimination not be brought to court. If an aggrieved employee is free to choose between the administrative process and direct access to the courts, government officials will have to take steps to render that process attractive to employees, in terms of both speed and effectiveness, or the process will be less likely to be used. That would tend to deter agency officials from withholding information about the complaint process or discouraging its use. Compare *Penn* v. *Schlesinger*, No. 74-476.

B. Even If Exhaustion Is Generally Required In Such Actions, It Should Not Be Required In This Case

Assuming, *arguendo*, that the requirement of exhaustion is applicable to section 1981 actions against the federal government, that is not conclusive of the correct disposition of this case. Even where exhaustion is generally appropriate, that requirement should not be "blindly" applied. *McKart* v. *United States*, 395 U.S. 185, 201 (1969).

[121] See United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort—1974, v. 5, pp. 61-62; pp. 3aa-4aa.

The Second Circuit, however, did not consider whether such exhaustion was appropriate on the facts of this particular case. The Court of Appeals stated "There is nothing in the allegations of Brown's complaint which justifies the 'premature interruption of the administrative process'". P. 16a. This statement is somewhat unfair. At no time prior to oral argument in the Court of Appeals did the United States ever contend that petitioner had not adequately exhausted his administrative remedies. Neither in its various motions in the district court, nor in its lengthy appeal brief, did the Department of Justice suggest petitioner was obligated to appeal to the Appeals Review Board. Petitioner, assuming that no further exhaustion was required since he had met the exhaustion standards of §717(c), repeatedly asserted he had fully exhausted his administrative remedies.[122] Only at oral argument did the government suggest that petitioner might have had an obligation to appeal to the Board. While it may have been within the discretion of the Court of Appeals to permit the government to raise such an entirely new issue for the first time at oral argument, it certainly was unreasonable to penalize petitioner for having failed to respond to that argument some 18 months *earlier* when his complaint was filed.

The delays which had already occurred in the processing of his complaint excused petitioner from any responsibility to further exhaust. The Civil Service Commission's regulations expressly require that every agency must take final action on an employment discrimination complaint within 180 days after it is filed. 5 CFR §712.220(a). Section 717 (c), which embodies a congressional determination as to the maximum amount of delay to which a federal employee should be subjected, gives such employees a right to sue without further exhaustion 180 days after a complaint is

[122] Brief for Appellant, No. 73-2628, 2d Cir. pp. 2, 61.

filed. In the instant case the defendant agency consumed 617 days processing petitioner's complaint. The agency had been in violation of the government's own regulations for over a year when petitioner finally filed suit.

Petitioner urges that, if exhaustion is required in these cases, the courts should adopt this 180 day rule as fixing the point in time after which further efforts at exhaustion are not required in a non-Title VII action. That time limit reflects the considered judgment of Congress and the Civil Service Commission as to what would constitute a reasonable deadline, considering both the burdens on the employee and the time needed for an expeditious administrative proceeding. Such a rule would be congruent with the comparable provisions of Title VII, would provide a clear standard by which both agencies and employees can guide their conduct, and would avoid the uncertainty and litigation generated by an *ad hoc* approach in each case.

Federal employees are also entitled to sue under §717 once final agency action has occurred. Employees should be equally free to invoke their non-Title VII remedies at that point as well, regardless of whether 180 days have passed. The provision in §717 allowing federal employees to sue without taking an appeal to the Appeals Review Board is based on an express congressional determination that such appeals are usually futile because "the record shows that the Board rarely reverses the agency decision".[123] Inasmuch as the entire exhaustion doctrine, unlike statutes of limitations[124], is a creation and creature of the federal judiciary, this Court should, we submit, defer to congressional judgment in this regard rather than requiring the aggrieved employee to prove in each case that such an

[123] H. Rep. 92-238, 92nd Cong., 2d Sess., p. 24.

[124] See *Johnson* v. *Railway Express Agency*, 44 L. Ed. 2d 295, 302 (1975).

appeal would be pointless.[125] If an employee were required either to appeal to the Appeals Review Board or to impair his non-Title VII rights,[126] he would have to choose between such impairment and sacrificing the right deliberately provided by Congress under §717 to sue without further delay. Such a result would change sections 717 and 1981 from complementary to conflicting remedies, and tend to require an employee to elect between them.[127]

Petitioner, moreover, maintains that, as a matter of fact, an appeal to the Appeals Review Board would be futile. The Board's Annual Reports clearly establish a *prima facie* case of futility—in the last three fiscal years the Board has reversed an agency decision and entered a finding of discrimination in only 37 of 1876 appeals, less than 2%.[128] In most of the 37 cases, moreover, neither back pay nor promotions were awarded to the complainant. If afforded an appropriate evidentiary hearing on this question, petitioner would adduce evidence demonstrating why so few appeals are successful and that the process is little more than an empty ritual.[129]

[125] See p. 51, *supra*.

[126] Those rights would not be forfeited by his failure to take such appeal, provided he took it later upon being afforded an opportunity to do so by the court. See pp. 65-67, *infra*.

[127] Such forced elections among independent remedies is contrary to the congressional scheme. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 49-51 (1974). It is manifestly inconsistent with *Alexander* to require an aggrieved employee to sacrifice his rights under one remedy as a condition of receiving relief under another remedy. Were the rule otherwise, an employer could condition the providing of partial relief under one independent scheme upon the waiving of the employee's rights to seek complete relief under a complimentary scheme, a clearly impermissible result. It is unclear whether an employee might be able to partially avoid this dilemma by suing under §717 on the 5th day and appealing to the Board on the 10th day, but Congress certainly did not contemplate that such tactical maneuvering would be necessary to preserve independent remedies.

[128] Board of Appeals and Review, Work Load Statistics. Fiscal Years 1972, 1973, 1974. See *Sperling* v. *U.S.*, 9 EPD ¶ 10,100, p. 7487 (3d Cir. 1975).

In any event, if this Court, or the district court on remand, should conclude that petitioner had an obligation to further exhaust the administrative remedies, the proper disposition of the case would not be an outright dismissal. At least since *Prentis* v. *Chesapeake & Ohio Railway*, 211 U.S. 210, 232 (1908), it has been clear that, where a party has not properly exhausted his administrative remedies, the court is not to dismiss the case but merely to stay proceedings while that administrative proceeding is resumed and completed.[130]

In *Penn* v. *Schlesinger*, No. 74-476, the government, while objecting that plaintiffs had not exhausted their administrative remedies, did not seek a dismissal with prejudice,

[129] At such a hearing the evidence would show: (1) that the Board virtually never follows or even considers substantive federal law as expounded by the courts regarding employment discrimination; (2) that the Board members have neither expertise nor experience in employment discrimination or personnel matters; (3) that there has been racial discrimination in the promotion of Board personnel; (4) that Board members tend to vote along racial lines; (5) that the Board does not treat its earlier decisions as meaningful precedent, and decides each case on an *ad hoc* basis; (6) that the seven members of the Board write each year approximately 3,000 opinions totaling some 15,000 pages, and that this volume of work precludes Board members from significant consideration of the facts of each case; (7) that the opinions in each case are drafted by appeals examiners employed by the Board before it is considered by the members, that these drafts are rarely altered by the Board, and that the examiners are primarily recent law school graduates with no experience whatever in federal personnel problems, employment discrimination questions, or the practice of law.

[130] See also *Christian* v. *New York Department of Labor*, 414 U.S. 614, 624 (1974); *Pacific Telephone, etc. Co.* v. *Keykendall*, 265 U.S. 196 (1924); *Parisi* v. *Davidson*, 405 U.S. 34, 36 (1972); *Somma* v. *United States*, 283 F.2d 149 (3d Cir. 1960).

but asked only that the plaintiffs be required to complete exhaustion. The government correctly recognized that, if this procedure were followed, a time limit should be placed on further administrative proceedings to prevent unfair delay.[131]

Where a litigant has failed to satisfy applicable exhaustion requirements, this is certainly the correct approach.[132] It would of course be inappropriate for any governmental defendant to object that there were as yet unused administrative processes, and yet oppose permitting the plaintiff to invoke such procedures. That is particularly true for federal employees as to whom Congress itself has determined that the exhaustion requirements are unclear.[133] An employee should not be required to guess, at peril of forfeiting his claim, when the moment has arrived which a court may later determine was the right time to sue. Accordingly, if this Court or the district court concludes that petitioner

---

[131] Appellants' Supplemental Brief on Rehearing *En Banc, Penn* v. *Schlesinger*, No. 72-3684, 5th Cir. p. 10, n. 9. "On the remand the district court should proceed by dismissing the complaint without prejudice to the plaintiffs filing a new action, if necessary, upon exhaustion of administrative remedies. In the alternative, the district court could simply stay all further proceedings until plaintiffs have exhausted their administrative remedies. Cf. *Somma* v. *United States*, 283 F.2d 149 (C.A. 3, 1960). The court may also wish to specify a time period within which the defendant agencies could act on plaintiff's claims and after which plaintiffs could return to court. This approach was adopted in the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-16(c) which gives agencies 180 days from the filing of the initial charge within which to act after which the aggrieved employee or applicant may file suit."

[132] In a section 717 action, of course, such a stay of judicial proceedings would be inappropriate once the specific exhaustion requirements of that statute were met. Congress authorized the filing of a civil action after 180 days because it concluded that it would be unfair to the plaintiff to require him to delay further. *Grubbs* v. *Butz*, 514 F.2d 1323 (D.C. Cir. 1975).

[133] See p. 57, *supra*.

was required to further exhaust his administrative remedies, the district court on remand should permit petitioner to file an appeal with the Appeals Review Board, and if he does so, to issue an appropriate stay of further proceedings[134] for a period of no more than 180 days while the Board considers that appeal.

CONCLUSION

For the above reasons, the judgment and opinion of the Second Circuit should be reversed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
MELVYN R. LEVENTHAL
BARRY L. GOLDSTEIN
BILL LANN LEE
ERIC SCHNAPPER
10 Columbus Circle
New York, New York 10019

JEFF GREENUP
200 West 135th Street
New York, New York 10030

Counsel for Petitioner

---

[134] The stay would not normally bar all judicial proceedings. Under most circumstances, as in the instant case, discovery should be permitted during this period, since there is no provision for discovery in the administrative process and the information revealed would be of assistance to the agency or Board, and, if they deny relief, to the court.

APPENDIX

Appendix A*

Region Two—General Services Administration
Work-Force Analysis By G.S. Grade
November 30, 1973

G.S.	*White*	*Other** Minority*	*Black*	*Total*	*% of Total Black*
1	—	—	—	—	—
2	2	—	6	8	75%
3	78	14	48	140	34%
4	192	21	71	284	25%
5	205	31	87	323	27%
6	55	4	21	80	26%
7	80	12	25	117	21%
8	15	1	2	18	11%
9	92	5	17	114	15%
10	—	—	—	—	—
11	140	1	21	162	13%
12	107	10	5	122	4%
13	52	3	3	58	6%
14	23	1	2	26	8%
Totals	1041	103	308	1452	21.2%

	Black Male	*Black Female*	*White Male*	*White Female*
Average Grade	6.89	5.25	8.8	5.08

* This compilation derives from Affirmative Action Plan FY 1975, G.S.A., Region Two. It is not part of the record in this case.

** Spanish Surname, American Indian & Oriental

Appendix B

Excerpt from *The Federal Civil Rights Enforcement Effort—1974*, Volume V, To Eliminate Employment Discrimination.

A Report of the United States Commission on Civil Rights, July 1975.

(See Opposite) ☞

IV. Processing Title VII Complaints

Prior to the extension of Title VII coverage to Federal employment, the Commission had issued regulations governing employment discrimination complaints brought under Executive Orders 11246 and 11478.[201] In 1971, congressional committees in both the House and Senate strongly criticized the Commission's complaint procedures and determined that they may have actually denied employees impartial investigations and fair consideration. Bias against complainants appeared to the committees to be inherent in the procedures, since the allegedly discriminatory agencies were responsible for investigating the complaints and rendering final decisions, unbound by the findings of the hearing officers. Agencies' final decisions were appealable to the Commission's Board of Appeals and Review (BAR), but were affirmed in most cases.[202] Finally, the committees found that the complaints system, as well as other parts of the Federal Equal Employment Opportunity (EEO) program, had been seriously weakened by the Commission's narrow view of discrimination as primarily a problem of individual bigotry rather than the result of systemic practices.[203] The Senate committee, whose provisions on

---

201. 5 C.F.R. § 713.211, et seq. (1969).

202. Legislative History, supra note 42, at 84 and 423.

203. Id. The Commission's complaint procedures were also strongly criticized in a report prepared by Ralph Nader's Public Interest Research Group in June 1972. See M.W. Brewer, Jr., Public Interest Research Group, Behind the Promises: Equal Employment Opportunity in the Federal Government (1972).

Federal employment ultimately passed, reported that the new Title VII authority was "...intended to enable the Commission to reconsider its entire complaint structure and the relationship between the employee, agency and Commission in these cases."[204]

As indicated in the discussion below, almost three years after the enactment of this legislation, the Commission's regulations were still fundamentally biased against the employment discrimination complainant, for many of the same reasons recognized by the congressional committees in 1971. In addition, the Commission's interpretations of complainants' substantive and procedural rights were in many respects contrary to the requirements of Title VII.[205]

The Commission regulations in effect in 1975[206] set out detailed steps which aggrieved persons must follow in challenging employment

204. Id. at 423.

205. The Commission maintains that parts of the 1972 Amendments to Title VII "were drafted to accommodate specifically to the" complaint system existing at the time of the enactment of the legislation. "Therefore," the Commission believes, "the basis for the report's conclusion that the system and the rights granted to Federal employees and applicants are contrary to Title VII requirements is difficult to find." Hampton letter, supra note 7.

206. 5 C.F.R. § 713.211 et seq. (1974). The regulations adopted in 1969 were only slightly revised in 1972 following the enactment of the 1972 Amendments to Title VII. 5 C.F.R. § 713.211 et seq., 37 Fed. Reg. 22717 (Oct. 21, 1972). A listing of the revisions made at that time is found in FPM Letter No. 713-17 (Attachment 1), Nov. 3, 1972. For a discussion of the revised complaint regulations, see, Brief for the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund as Amicus Curiae, Laurel v. United States, appeal docketed No. 74-3746, 5th Cir. 1974. Further revisions were made in the regulations in 1974 to include provisions for the processing of complaints alleging discrimination on the basis of age, pursuant to Public Law 93-259 (effective May 1, 1974). FPM Letter 713-28, July 9, 1974.

discrimination in Federal employment.[207] Following an informal process, complaints proceed through formal investigation and a hearing, if requested by the complainant, and are then subject to final decision by the agency head or other designated official. Complainants may file a civil action in U.S. district court after 180 days from the initiation of the complaint or after final agency action. They may also appeal the agency's final decision to the Commission's Appeals Review Board.[208]

These procedures do not apply to general allegations of discrimination unrelated to a specific individual, which are made by an individual complainant or a third party.[209] When complaints are made alleging discrimination against a class, the agency is required only to establish a file and to notify the complainant of its decision, which the complainant may appeal to the Commission within 30 days. There is no requirement that the agency conduct an investigation, nor are any time limits set for agency action.[210] Complainants are not permitted access to the investigatory file until the case is closed, and there is no right of appeal to the Appeals Review Board.[211] Further, the Commission regulations do not acknowledge that

207. Employee complaints alleging improper agency actions on grounds other than race, ethnic, or sex discrimination are processed according to entirely different procedures which provide for a hearing before the Commission, but no right of appeal to the Commission's highest reviewing authority, the Appeals Review Board - 5 C.F.R. § 772. These procedures apply to employees' challenges to adverse actions such as termination, probation, or pay classification. Complainants frequently are faced with having to elect which of these procedures to follow in challenging an adverse action which they believe to be racially or sexually discriminatory.

208. The name of the Board of Appeals and Review was changed in 1974 to the Appeals Review Board.

209. 5 C.F.R. § 713.212(b).

210. 5 C.F.R. § 713.251. There are no procedural requirements governing the conduct of such investigations.

211. FPM Letter No. 713-20 (Jan. 27, 1975).

BEST COPY AVAILABLE

complainants raising general allegations have the right to file a civil action in court.[212] During the first quarter of fiscal year 1975, approximately 25 general allegation complaints had been referred to the Commission for review.[213] However, complainants challenging an agency's employment practice, for example, a job requirement which may adversely affect a minority group, may pursue the challenge through the regular complaint procedures.[214] However, when an employment practice required by the Commission is challenged, the complaint may be made in the form of an appeal to the Commission.[215] The Commission has failed to

---

212. 5 C.F.R. § 713.281.

213. The Commission did not begin to collect data on the total number of such complaints filed nationally until fiscal year 1975. In the Washington, D.C., area alone, 14 general complaints were reviewed during fiscal year 1974. In only two instances was the agency's decision reversed. In one of these cases, the agency was ordered to establish a Sixteen Point Program. The Sixteen Point Program, now called the Spanish Speaking Program, is discussed on p. 108 infra. In the other instance, the agency was instructed to discontinue requiring a job qualification which was related to a single recruitment source. Interview with Paul Leslie, Chief, Washington Operations Division, Bureau of Personnel Management Evaluations, CSC, Nov. 13, 1974.

214. 5 C.F.R. § 300.104(c).

215. 5 C.F.R. § 300.104(a). An appeal is made to the Appeals Review Board whose decision is final, subject to discretionary review by the Commissioners. 5 C.F.R. § 772.401; 5 C.F.R. § 772.308. In at least two instances, court challenges to the Commission's entrance examinations have been dismissed or remanded for failure of the complainants to exhaust these administrative procedures. Douglas v. Hampton, supra note 121; League of United Latin Am. Citizens v. Hampton, 501 F.2d 843 (D.C. Cir. 1974). To date, there have been few complaints filed with the Commission pursuant to these regulations. See In Re Shirley Long, Appeals Review Board, CSC, Nov. 13, 1972 (finding improper a job requirement by the U.S. Park Police that candidates weigh a minimum of 145 lbs. and have a minimum height of 5'8").

cross-reference these provisions in the standard complaint regulations; thus, many complainants are unaware that they may challenge broad practices in their complaints.[216]

Although Title VII includes no restrictions on the filing of a complaint against a Federal agency, the Commission has imposed stringent conditions.[217] The Commission regulations bar applicants or employees from initiating individual complaints unless an informal complaint is first registered within 30 days of the date on which the allegedly discriminatory act occurred.[218] In addition, the complainant must allege

---

216. Interview with Charles Ralston, Attorney, NAACP Legal Defense and Educational Fund, Mar. 20, 1975.

217. The Commission strictly construes the definition of applicant for employment. It has held, for example, that a person who takes a Federal Government basic entry examination but who has not applied for employment at a specific agency is not an applicant with the Civil Service Commission or other agency and, therefore, may not file a complaint. Appeals Review Board Decision in Case No. 713-74-278, Dec. 11, 1973.

218. The current regulations do not contain a provision included in previous regulations which permitted the filing of a complaint at any time if the alleged discrimination was continuing in nature. Compare 5 C.F.R. § 713.213 (1969) with 5 C.F.R. § 713.214 (1972). Title VII complainants may file discrimination charges with the EEOC against private employers or State and local governments within 180 days of the date of the alleged discriminatory act, 42 U.S.C. 2000e-5(e), but the statutory time limitation has been held not to apply in cases charging continuing discrimination. Culpepper v. Reynolds Metals Co., 296 F. Supp. 1232, 1235-6, (N.D. Ga. 1969), rev'd on other grounds, 421 F.2d 888 (5th Cir. 1970). Federal complainants, however, must comply with the Commission's strict time limitations unless they can show good cause for the delay. 5 C.F.R. § 713.214(a)(4). Thus, a Federal complaint was rejected as untimely where a female alleged continuing sex discrimination in promotion practices on the grounds that her complaint was filed 247 days after the most recent denial of promotion to her. Appeals Review Board, Decision in Case No. 713-74-291, Dec. 17, 1973. The Commission's position barring complaints alleging continuing discrimination is squarely in conflict with Title VII law. The Commission believes that "the requirement for timely filing of complaints benefits all parties as it permits a comprehensive investigation of recent events which are still fresh and reconstructible in the witnesses' minds." Hampton letter, supra note 7.

a specific act of discrimination.[219] The complaint is treated informally by an Equal Employment Opportunity Counselor, who is directed to seek resolution of the matter within 21 days. If informal measures fail, the counselor must inform the aggrieved person of the right to file a formal written complaint within 15 days of the notice.[220]

---

219. Hampton letter, supra note 7. Despite congressional criticism of the Commission's tendency to view the problem of discrimination as one of individual actions and to ignore systemic discrimination, the Commission, nevertheless, conditions its complaint procedures on the allegation of a specific act of discrimination. See Legislative History, supra note 42, at 423.

220. The Commission maintains that "the great majority of EEO-related issues of concern to employees are resolved informally, and some form of corrective action is taken by the agency as a result of over one-third of these contacts with counselors." Therefore, the Commission believes that this process is "an effective means of resolving problems quickly and informally and substantially reducing the number of issues which need to be processed through the formalized complaint system and the courts." Hampton letter, supra note 7. On the other hand, there may be some question whether complainants are fully informed at this stage of the nature of the discrimination they may have experienced or of the relief to which they may be entitled. Ralston interview, supra note 216.

In the past, from 10 to 11 percent of all informal complaints developed into formal complaints:

	Number of Persons Counseled	Number of Formal Complaints
Fiscal Year 1972	16,883	1,834 (11%)
Fiscal Year 1973	26,627	2,743 (10.3%)
Fiscal Year 1974	31,484	3,435 (10.9%) [221]

The vast majority of formal complaints in each fiscal year alleged race discrimination, followed in frequency by allegations of discrimination on the basis of sex, national origin, and religion.[222]

When a complaint is filed, the head of the agency or designated official may reject any portion of the complaint which is of a general

---

221. Memorandum to Irving Kator, Assistant Executive Director, CSC, from Anthony W. Hudson, Director, Office of Federal Equal Employment Opportunity, CSC, Aug. 23, 1974. Approximately 35 to 45 percent of the informal complaints were followed by some "corrective action," but not necessarily any specific relief to the complainant. Id. An analysis of corrective actions taken by agencies in fiscal year 1973 found that these measures most frequently consisted of an "improved personnel practice," promotion, reduction or rescission of adverse action, training opportunities, or reassignment. The next most frequently occurring corrective actions were reinstatement, priority consideration for promotion, improved EEO practices, and removal of adverse material from official personnel folders. Telephone interview with Anthony W. Hudson, Director, Office of Federal Equal Employment Opportunity, CSC, Nov. 25, 1974.

222. Race discrimination complaints represented 68.4 percent of the total formal complaints in fiscal year 1972, 61 percent in fiscal year 1973, and 60.3 percent in fiscal year 1974. The respective figures for the other bases were as follows: sex-female, 16 percent, 20 percent, 21.7 percent; sex-male, 3.6 percent, 4 percent, 6.3 percent; national origin, 9.1 percent, 10 percent, 9.5 percent; religion, 2.6 percent, 5 percent, 4.3 percent. Hudson memorandum, supra note 221. The Commission's tabulation of complaints did not indicate the number of complaints alleging both sex and race or national origin discrimination.

nature and not related to the individual.[223] In fiscal year 1974, 10 percent of final complaint dispositions reported by agencies were rejections of complaints.[224] The Commission has not issued clear guidelines specifying what types of allegations are "unrelated" to an individual complaint.[225] It has consistently held, however, that complaints alleging discrimination against a particular class of employees, of which the complainant is a member, are not within the purview of the standard complaint procedures.[226] In contrast, class and individual

---

223. 5 C.F.R. § 713.215. The complainant may challenge such a rejection by appealing to the Commission or by filing a civil action. Id.

224. Of 2,650 dispositions, 265 were rejections. Hudson memorandum, note 221.

225. The Commission has merely indicated that allegations of discrimination which do not fall within the purview of the regulations are those not filed by an employee or applicant for employment in the agency where the act occurred, do not relate to an employment matter over which the agency has jurisdiction, or are not based on race, color, sex, religion, or national origin. FPM Letter No. 713-213, Sept. 21, 1973. The Commission has indicated that "each complaint must be considered on its own merits. What may be an 'unrelated' allegation in one complaint may well be the core of another complaint." Hampton letter, supra note 7.

226. See, for example, Appeals Review Board, Decision in Case No. 713-74-275, Dec. 10, 1973. The complainant alleged that an agency policy of controlling grade escalation, which applied to only two job classifications, was discriminatory on the basis of sex, since virtually all employees in the two classifications were women. The complainant was an employee in one of the two job categories. Similarly, a Native American employee denied a promotion filed a complaint alleging discrimination against Native Americans in promotions; the class allegation in the complaint was rejected. Appeals Review Board, Decision in Case No. 713-74-289, Dec. 17, 1973. Since the Commission does not permit the regular processing of class-wide complaints, some Federal district courts have held that a class action law suit is barred. See, e.g., Pendleton v. Schlesinger, No. 1689-73 (D.D.C. Aug. 9, 1974). In November 1974, the NAACP Legal Defense and Educational Fund filed a lawsuit challenging the Commission's practice of severing class allegations from individual complaints. Barrett v. United States Civil Serv. Comm'n, Civil No. 75-1694 (D.D.C. Nov. 20, 1974). See also, letter from William P. Berzak, Chairman, Appeals Review Board, to Allen Black, NAACP Legal Defense and Educational Fund, Oct. 18, 1974, which affirmed that the Commission does not permit individuals to include class discrimination allegations in their individual complaints.

discrimination claims under Title VII have historically been treated simultaneously, since the Federal courts have long held that employment discrimination is, by definition, class discrimination.[227] From the complainant's standpoint, severance of class issues from the individual claim in the administrative process can be extremely detrimental because it may preclude collection and introduction of evidence relating to the class which may be highly material to the individual's case.[228]

The rule of rejecting portions of complaints not previously raised also appears to be contrary to the historic treatment of Title VII complaints. Charges before the EEOC have generally been broadened, where appropriate, to encompass like and related issues to the one raised by the charging party.[229] This practice was adopted by EEOC and upheld by the courts on the grounds that victims of employment discrimination most often do not comprehend the complex sources of that discrimination.[230] There is no reason to believe that Federal employees are any different.

---

227. See, e.g., Oatis v. Crown Zellerbach, 398 F.2d 496, 499 (5th Cir. 1968); Jenkins v. United Gas Corp. 400 F.2d 28, 33 (5th Cir. 1968).

228. Interview with Roderick Boggs, Federal Employment Project, Washington Lawyers Committee for Civil Rights Under the Law, Mar. 19, 1974. In private employment discrimination cases, statistics showing the relative status of the entire class are relevant to the individual discrimination complaint. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

229. See, e.g., Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970).

230. See, e.g., Danner v. Phillips Petroleum Co., 447 F.2d 159, 161-2 (5th Cir. 1971). Although matters not expressly raised by the Federal employee in the informal complaint may be rejected from the formal complaint, matters not expressly raised in the formal complaint may be subsequently investigated if they relate to the "work situation." 5 C.F.R. § 713.216(a).

If a complaint is not rejected, it is then the responsibility of the agency's Equal Employment Opportunity Officer to provide for the complaint investigation.[231] Complainants are not given the right to influence the scope or method of the investigation. The regulations do not require that investigators be certified or trained in employment discrimination matters, but only that they be employees from a part of the agency not subordinate to the agency official in charge of the unit in which the complaint arose.[232] Until September 1974, the Commission provided agencies with investigators on a reimbursable basis. Effective September 3, 1974, agencies were required to assign their own staffs to investigations.[233] Thus, despite congressional concern expressed in 1971 that there was an inherent bias in the complaint investigation procedures, Commission regulations still provide that the investigation be conducted by employees of the allegedly discriminatory agency.[234]

---

231. 5 C.F.R. § 713.216.

232. Id. Investigators of Federal Title VII complaints may be persons with investigative experience or those who work in occupations requiring investigative skills, such as attorneys, auditors, personnel management specialists, or management analysts. FPM Letter No. 713-34, supra. The Commission provides training for agency investigators, and has proposed a rule which would require certification by the Commission. Hampton letter, supra note 7.

233. FPM Letter No. 713-34, June 1974. However, between September 1973 and April 1975, the Commission conducted 18 investigations on the requests of agencies and between December 1974 and April 1975 assumed jurisdiction of 62 complaint investigations because of undue delay by agencies. Hampton letter, supra note 7. The Commission's policy is to conduct investigations for agencies where there is a potential conflict of interest, publicity or outside interest, or where the agency is small. Id.

234. In 1973, this Commission recommended that the Civil Service Commission reevaluate its regulations providing for investigations by agency personnel, since there were serious questions about the impartiality of such investigators. See, U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort: A Reassessment 55 (1973). The Commission sees no basis for the statement that there is inherent bias in the investigation process. Hampton letter, supra note 7.

Commission regulations further provide that the investigation include a thorough review of the general work environment in which the complaint arose and a comparison of the "...treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred...."[235] This provision ignores the possibility that the complaint may have arisen in an organizational segment in which there was discriminatory segregation of one class.[236] It further militates against proper analysis of the work force, since the complainant's group is to be compared with the aggregate of all other groups rather than with each separate group.[237] In addition, the term "organizational segment" is not defined to indicate clearly how broad or restricted the investigation should be.

The Commission issued guidelines in 1971 explaining in more detail how complaint investigations are to be conducted.[238] These investigation guidelines suffer from a number of deficiencies, only a few of which

---

235. 5 C.F.R. § 713.216.

236. For example, a complaint may arise in an all-female clerical pool or in an all-black mail room. The Commission does not believe this provision to be deficient because the term "organizational segment" may be interpreted very broadly. Hampton letter, supra note 7.

237. An analysis might find, for example, that 40 percent of minorities and 20 percent of nonminorities are concentrated in the lowest four grades. If the complainant is a minority female, the investigation should compare the condition of minority females separately with that of nonminority females, minority males, and nonminority males in order to determine the disparity between the status of minority females, and the other groups. In a typical situation, this analysis would find that 50 percent of minority females, 40 percent of nonminority females, 30 percent of minority males, and 5 percent of nonminority males are concentrated in these grades. Thus, the disparity between the complainant's group and the group with the best status is a difference of 45 percent, rather than 20 percent. For data showing the composition of the work force in the lowest four grades, cross-tabulated by race and sex, see CSC, Manpower Statistics Division, Bureau of Manpower Information Systems, Federal Civilian Personnel Statistics: Federal Civilian Employment by Minority Group and Sex, Nov. 30, 1972.

238. Investigating Complaints of Discrimination in Federal Employment, CSC, Oct. 1971 /hereinafter cited as Investigation Guidelines/.

would be eliminated in revised draft guidelines circulated in November 1974.[239] The most serious deficiency in the current guidelines is their failure to include a correct definition of the meaning of discrimination. The guidelines implicitly adopt a definition limiting discrimination to overt acts or patterns of "unfair treatment."[240] The guidelines in draft stage in 1974 did not correct this deficiency,[241] despite the well established rule under Title VII that illegal discrimination includes not only disparate or unfair treatment, but also neutral treatment which had a disparate effect on any ethnic, racial, or sex group, unless justified by some compelling, nondiscriminatory purpose.[242]

Second, the guidelines generally limit the scope of the investigation to the actions and decisions of the allegedly discriminatory agency official and to the organizational segment in which the complaint arose.[243] The proposed new guidelines would permit extending the investi-

---

239. Draft Investigation Guidelines (undated), provided by Mr. Anthony W. Hudson, Director, Office of Federal Equal Employment Opportunity, CSC, Nov. 1, 1974 /hereinafter cited as Draft Investigation Guidelines/.

240. The current guidelines state that the investigation should be sufficiently comprehensive to uncover any evidence of overt discrimination and should develop enough information to bring out...any pattern of nonselection or unfair treatment of members of the complainant's group which might constitute evidence of discrimination...." Investigation Guidelines, supra note 238, at 5.

241. The draft guidelines state that "A pattern of discrimination is established by evidence which shows disparate treatment of members of the complainant's group when compared with the treatment of members of other groups." Draft Investigation Guidelines, supra note 239, at 29-30.

242. Griggs v. Duke Power Co., supra note 114.

243. Investigation Guidelines, supra note 238, at 9. This limitation can operate severely to the disadvantage of the complainant, since statistical evidence based on the agency as a whole has been held to be highly material to an individual's case. See, for example, Robinson v. Warner, No. 1654-23 (D.D.C., June 24, 1974) in which the court supplemented the administrative record with statistical evidence based on the entire Navy Command Systems Support Activity and reversed the agency's final determination of nondiscrimination.

gation to other units under the same administrative jurisdiction but not to the agency as a whole.[244]

Third, the guidelines on investigating complaints arising in the selection or promotion process fail to include essential instructions on investigating a personnel action. The guidelines merely instruct the investigator to list the name, sex, race, or ethnicity of each of the candidates and their relative ranking. There are no instructions to investigate the possibility of systemic discrimination in the ranking itself or in the process by which candidates were placed on the certificate list of eligibles.[245] The proposed new guidelines indicate that the investigator should "...consider the need for looking into the reasons why the complainant did not appear on the certificate or was not rated high enough to be within reach on the certificate,"[246] but they do not

---

244. Draft Investigation Guidelines, supra note 239, at 30.

245. Investigation Guidelines, supra note 238, at 15-17. The failure to include such an analysis in an investigation can seriously injure the complainant. For example, a black female who was the only black in her division and who had been passed over for promotion three times and for training opportunities two times was held not to have been subjected to race discrimination on the grounds that the selection panel's decision was based on "documentary appraisals and evaluations" and the personal knowledge of the candidates by the three panel members, two supervisors and the selecting official. Appeals Review Board, Decision in Case No. 713-74-284, Dec. 13, 1973. Race discrimination can easily occur in supervisors' appraisals of employees. See, e.g., Rowe v. General Motors, 457 F.2d 348 (5th Cir. 1972). Yet, the Commission made the decision in the above case without any indication that an investigation had been made of the evaluations and ratings given black applicants and employees by the agency. The Commission maintains, however, that the procedures for investigating promotion actions are adequate because they determine how and why each candidate is ranked. Hampton letter, supra note 7.

246. Draft Investigation Guidelines, supra note 239, at 11.

include instructions on the method by which this investigation should be conducted.[247] Neither the current nor proposed guidelines contain any instructions concerning the investigation of qualification standards which may have had an illegally discriminatory effect on the complainant.[248]

Finally, both sets of investigation guidelines suffer from extreme vagueness. For example, both instruct the investigator to determine whether there exists "...any improper segregation of personnel by reason of their membership in the group alleged to have been discriminated against,"[249] but there is no explanation of the meaning of the term "improper." Similarly, the investigator is instructed to collect "information about the agency's merit promotion plan and procedures, if needed for an understanding of the case."[250] However, there are no criteria included for determining the relevance of such information, or for evaluating a merit promotion system to determine compliance with the dictates of Title VII.

---

247. Id. at 39-43.

248. In reviewing individual complaints, the Commission does not consider the job relatedness of a particular selection standard which rejected the complainant. The draft guidelines propose to prohibit the inclusion in the investigative file of any Commission Job Element Guides or rating schedules. Id. at 15. This information could be essential to challenging the job relatedness of a qualification standard.

249. Investigation Guidelines, supra note 238, at 10; Draft Investigation Guidelines, supra note 239, at 31.

250. Investigation Guidelines, supra note 238, at 17; Draft Investigation Guidelines, supra note 239, at 42.

The new guidelines in draft stage as of November 1974 contained two distinct improvements over the current guidelines in that they emphasized the importance of the investigator's maintaining independence from the agency's officials[251] and that they permitted the investigator to collect information relevant to a basis of discrimination other than that charged by the complainant.[252] The revisions to the 1971 version of the Guidelines were prepared without consulting with EEOC,[253] despite a clear request from Congress in 1972 that the Commission obtain EEOC's advice on equal employment matters.[254]

---

251. Draft Investigation Guidelines, supra note 239, at 12. The draft guidelines would prohibit specifically, for example, the disclosure of the investigative file to these officials during the investigation. Id.

252. Id. at 26. Permitting this flexibility to the investigator is important, since it is not uncommon for a complainant to allege one basis of discrimination, e.g., sex discrimination, when in fact she or he may be the victim of race or ethnic discrimination as well.

253. Hudson telephone interview, supra note 221. The Commission consulted with representatives from agency internal EEO programs, including representatives from EEOC. However, the Commission did not consult with the EEOC Office of Compliance. Hampton letter, supra note 7.

254. Legislative History, supra note 42, at 425. The Commission's staff indicated that EEOC was not consulted concerning the revision because the Commission perceived that the two agencies had basic differences in approach to investigations. According to the Commission's staff, Federal complaint investigators are to look for evidence that individuals received disparate treatment; the Commission's staff felt that EEOC investigations were directed primarily to collecting statistical evidence on the class as a whole. Hudson telephone interview, supra note 221. For a discussion of EEOC investigations, see Chapter V infra. EEOC investigations, in fact, appear to entail collection of both types of information. There is a strong reason to believe that Congress intended that the basic approach of the Commission be more like that of EEOC in all matters and that the Commission utilize the reservoir of talent and expertise available within the EEOC for improving Federal complaint and other equal employment programs. Legislative History, supra note 42, at 425.

Commission regulations require the agency to make a second attempt to resolve the complaint informally following the completion of the investigation.[255] If an adjustment of the complaint is not obtained, the complainant is to be notified of the proposed disposition by the agency and of the right to request a hearing within 15 days of the notification.[256] In fiscal year 1974, slightly less than 25 percent of the complainants whose cases were decided had requested and received a hearing.[257]

Hearings are closed proceedings conducted by a complaints examiner,[258] who is certified by the Commission and who must be an employee[259]

---

255. 5 C.F.R. § 713.217(a). The complainant is entitled to review the investigation file.

256. 5 C.F.R. § 713.217(b).

257. Hearings were held in 643 of the 2,650 cases which received final dispositions during fiscal year 1974. Hudson memorandum, supra note 221; Hudson telephone interview, supra note 221.

258. Only persons directly connected with the complaint may attend. 5 C.F.R. § 713.218(c)(1). However, the allegedly discriminatory official is not entitled to be present. Discrimination Complaints Examiners Handbook, Office of Federal Equal Employment Opportunity, Apr. 1973, at 36.

259. 5 C.F.R. § 713.218(a). Complaints examiners must meet the qualifications established in the Commission's GS-930 (Hearings and Appeals) Series, which is applicable to most hearing officer positions not subject to the Administrative Procedure Act. A law degree is not required but may substitute for work experience in adjudicating cases. Expertise in Title VII law or employment discrimination matters is not required. Memorandum to J. Philip Bohart, Acting Director, Personnel and Labor Relations Division, from H. Alan McKean, Chief, Standards Division, Apr. 1, 1974. This certification standard was adopted in conjunction with a reorganization of the employee appeals system within the Commission and the establishment of the Federal Employee Appeals Authority. The reorganization primarily affected the system through which employees appeal adverse personnel actions and did not change any of the appeal provisions pertaining to discrimination complaints. CSC, New Federal Employee Appeals System (undated).

from another agency except in unusual circumstances.[260] The complainant has the right to be represented by counsel[261] and to cross examine witnesses but not the right to obtain information other than that collected by the agency or to subpoena documents or witnesses.[262] The hearing is not to be an adversarial proceeding but rather an extension of the investigation.[263]

To assist complaints examiners, the Commission issued an examiner's handbook in April 1973, which gives instructions on preparing for and conducting a hearing, admitting and evaluating evidence, and writing recommended decisions.[264] Although the Discrimination Complaints

---

260. Where an agency is prevented by law from disclosing to persons without security clearances information concerning the matter complained of, the complaints examiner may be an employee of the agency. 5 C.F.R. § 713.218(a).

261. With respect to representation by counsel, the Commission on Civil Rights recommended in 1970 that free legal assistance be provided on request to all employees who require it. Enforcement Effort report, supra note 147, at 358. The Civil Service Commission has not implemented such a program in the ensuing 5 years.

262. The complaints examiner has the authority to require agencies to produce witnesses requested by the complainant when the complaints examiner determines that the testimony is "necessary" and where it is not "administratively impracticable" for the agency to comply with the request. 5 C.F.R. § 713.218(e). Both the agency and the complainant have the right to submit evidence in the form of documents, affidavits, or testimony of witnesses. Discrimination Complaints Examiner Handbook, supra note 258, at 85, 87. The complainant may also request that the examiner request evidence or testimony. If the examiner denies the request, reasons must be given in the record.

263. Discrimination Complaints Examiners Handbook, supra note 258, at 5. See also, letter from Robert E. Hampton, Chairman, CSC, to Arthur F. Sampson, Acting Administrator, General Services Administration, June 18, 1973.

264. Id.

Examiners Handbook was issued more than a year after Title VII became applicable to Federal employment, it contains no guidelines or information on substantive Title VII law.[265] In addition, the Handbook's instruction concerning the meaning of discrimination and questions of burden of proof are contrary to the weight of authority under Title VII. The Handbook describes discrimination exclusively in terms of disparate treatment[266] and provides that complainants have the initial burden to present evidence of disparate treatment. The weight of Title VII law, however, does not place the burden on plaintiffs to show disparate treatment; instead, plaintiffs are held to make out a prima facie case of illegal discrimination by presenting statistical evidence showing a disparity in the employment status of the alleged discriminatees and other employees.[267] The Commission's handbook does not indicate that Federal Title VII complainants have access to this procedure in the context of the administrative hearing.[268] If the record establishes that disparate treatment has occurred, then the examiner is instructed to view the evidence most favorably to the agency and to make a finding of discrimination if a reasonable mind could not infer from the evidence so viewed that the agency's action was free from discrimination on the basis of race, color, sex, religion,

---

265. The Commission does, however, provide a digest of Title VII cases for complaints examiners. Hampton letter, supra note 7.

266. Id. at 57, 62. As noted on p. 72 supra, Title VII reaches not only disparate treatment but neutral treatment which has a disparate impact.

267. See e.g., McDonnell Douglas Corp. v. Green, supra note 228; Rowe v. General Motors Corp., supra note 245; Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970).

268. Complaints examiners frequently exclude evidence proffered to show discrimination against the complainant's class and such actions are routinely affirmed by the Appeals Review Board. See e.g., Appeals Review Board Decision in Case No. 713-73-593 (June 14, 1973).

or national origin.[269] In short, the instructions lead a reasonable person to believe that the complaints examiner is instructed to apply a standard which gives the benefit of the doubt to the allegedly discriminatory agency.

The findings and recommendations of the complaints examiner are not binding on the agency unless the examiner recommends a finding of discrimination and the agency has not issued a final decision within 180 days after the complaint was filed.[270] If the agency rejects or modifies the decision recommended by the complaints examiner, or if the agency's decision is made when a hearing is not requested, it must set forth the specific reasons for its final action.[271] During fiscal year 1974, 7 percent of final agency dispositions made a finding of discrimination.[272]

---

269. Discrimination Complaints Examiners Handbook, supra note 258, at 62. The Handbook states as follows:

> Where the record shows disparate treatment, the Examiner must then evaluate the evidence and assemble the facts which tend to establish a case free from discrimination based on the complainant's race, color, religion, sex, or national origin. If a reasonable and unprejudiced mind could not infer from the facts so assembled that the agency was free from discrimination in the matter, then the Examiner should make a finding of discrimination. Id.

270. 5 C.F.R. § 713.220(d); § 713.221(b).

271. 5 C.F.R. § 713.221. However, the Commission has held that an agency's failure to provide specific reasons for its action does not invalidate the decision if the ARB provides reasons in its review. Minutes of Civil Service Commission, Feb. 27, 1974, declining to reopen Appeals Review Board Decisions Nos. 713-73-595, 713-74-179, and 713-74-43.

272. A finding of discrimination was made in 170 of 2,650 dispositions. Hudson memorandum, supra note 221. Final dispositions include rejections or cancellations of complaints. Findings of discrimination constituted 12.8 percent of all decisions on the merits. Complaints examiners made findings of discrimination more frequently than did agencies. In the 643 cases which went to a hearing, complaints examiners recommended a finding of discrimination in 109 (16.9 percent) cases. Agencies adopted contrary findings in 26.6 percent of these cases. CSC, Office of Federal Equal Employment Opportunity, Performance by Agency and CSC Complaints Examiners in EEO Discrimination Complaint Cases During FY 1974 (undated).

Commission regulations require that agencies proceed with the processing of complaints without "undue delay" so that complaints are resolved within 180 days after filing, including time consumed by a hearing.[273] However, in fiscal year 1974, the Government-wide average time spent processing a complaint was 201 days, which was 26 days longer than that of fiscal year 1973.[274] Some major agency complaint processing procedures averaged well over 300 days.[275]

---

273. 5 C.F.R. § 713.220.

274. Memorandum to Irving Kator, Assistant Executive Director, CSC, from Anthony Hudson, Director, Office of Federal Equal Employment Opportunity, CSC, Precomplaint Counseling and Discrimination Complaint Activity During Fiscal Year 1974, Aug. 23, 1974. Agencies whose average complaint processing time in fiscal year 1974 exceeded 180 days were as follows: Department of Agriculture (214 days); Department of the Army (211 days); Atomic Energy Commission (317 days); Department of Commerce (256 days); Defense Contract Audit Agency (307 days); Defense Supply Agency (211 days); Environmental Protection Agency (259 days); Equal Employment Opportunity Commission (296 days) Federal Communications Commission (856 days); General Services Administration (212 days); Department of Health, Education and Welfare (367 days); Department of Housing and Urban Development (369 days); Department of the Interior (197 days); Department of Justice (250 days); Department of Labor (253 days); National Aeronautics and Space Administration (254 days); National Labor Relations Board (296 days); Selective Service System (370 days); Small Business Administration (252 days); Department of Transportation (395 days); U.S. Information Agency (238 days); and U.S. Postal Service (189 days). Agencies whose average complaint processing time in fiscal year 1974 met the 180-day limit were as follows: Administrative Office of U.S. Courts, U.S. Air Force, Army and Air Force Exchange, Civil Service Commission, Commission on Civil Rights, Federal Maritime Commission, General Accounting Office, Government Printing Office, National Guard Bureau, National Science Foundation, Department of the Navy, Office of Management and Budget, Smithsonian, Department of State, Tennessee Valley Authority, Department of the Treasury, and Veterans Administration. During fiscal year 1974, there were no complaints filed against ACTION, Agency for International Development, Civil Aeronautics Board, Defense Communications Agency, Defense Intelligence Agency, Defense Mapping Agency, Defense Nuclear Agency, Federal Power Commission, National Gallery of Art, National Mediation Board, National Security Agency, Office of Economic Opportunity, or U.S. Soldiers Home. Id.

275. See, for example, HEW, HUD, DOT, cited in note 275 supra.

Title VII authorizes the Federal complainant to file a civil action in U.S. district court if the agency does not make a decision within 180 days or within 30 days of the final agency action.[276] A complainant may delay civil action by appealing to the Commission's Appeals Review Board[277] for a review of the record.[278] In fiscal year 1974, approximately 30 percent of agencies' final dispositions of complaints were appealed to the Appeals Review Board.[279] In approximately 75 percent of these cases, the agency decision finding no

---

276. 42 U.S.C. § 2000e-16c. A civil action may be filed within 30 days after final agency action or final action by the Commission if the complainant elects to appeal to the Commission.

277. The Appeals Review Board, formerly called the Board of Appeals and Review, consists of nine members appointed by the Chairman of the Commission. Board members are career civil servants who serve at the pleasure of the Chairman. As of November 1974, the Board consisted of 6 anglo males, 1 black male, 1 Spanish surnamed male, and 1 black female. The Board members, all of whom are attorneys, are assisted by a staff of 21 examiners and 15 clerical workers. None of the staff or Board members, as of November 1974, had had any previous experience in Title VII law. Interview with William Berzak, Chairman, Appeals Review Board, Nov. 7, 1974.

278. There is no right to a hearing before the Board, although it will receive written arguments in addition to the record compiled below. 5 C.F.R. § 713.234; Berzak interview, supra note 277.

279. 808 of the 2,650 final dispositions were appealed to the Board during fiscal year 1974. Appeals Review Board, Receipts and Production: EEO Appeals (Oct. 26, 1974).

discrimination or rejecting the complaint was affirmed.[280] In slightly more than 10 percent of the cases, the Board remanded the complaint to the agency for further investigation,[281] and in approximately 7 percent the appeal was cancelled by the complainant.[282] The Board reversed agencies' rejections of complaints and findings of no discrimination in 5.5 percent of the total decisions rendered.[283]

The Board reviews the record to determine if it shows that the complainant was subjected to disparate treatment.[284] It does not consider discrimination in the form of disparate impact. If disparate treatment is shown, the burden is then shifted to the agency to come forward with evidence

---

280. 575 of 778 Board decisions affirmed agencies' decisions finding no discrimination or rejecting the complaint. In fiscal year 1973, 585 of 692 Board decisions (or 84.5 percent) affirmed agencies' decisions. Appeals Review Board, Receipts and Production, supra note 279.

281. 82 of 778 Board decisions were in this category. In fiscal year 1973, only 3.6 percent of Board decisions (25 of 692) remanded cases to agencies. Id.

282. Id. In 1973, only 1.4 percent of Board final dispositions were the result of cancellations by complainants.

283. Id. In an additional two percent of the decisions, the Board recommended that further corrective action be taken by agencies. The remaining decisions reversed agency decisions on the grounds that improper procedures had been followed (.8 percent) or rejected the appeal as untimely (.5 percent).

284. The Board's definition of "disparate treatment" appears to be extremely narrow. It has held, for example, that "favoritism" is not a form of discrimination prohibited by law or regulations. Appeals Review Board Decision in Case No. 713-74-285, Dec. 17, 1973, wherein the complainant alleged that supervisors showed favoritism to white employees.

that the treatment was justified by some lawful purpose, such as Commission or agency qualification standards. An agency's decision finding no discrimination will be upheld if the evidence in the record supports the conclusion that the disparate treatment was justified.[285] The Board does not follow or refer to judicial decisions interpreting the substantive or procedural requirements of Title VII, nor does it follow the rule of stare decisis with regard to its own prior decisions.[286]

Although it is well settled under Title VII law that the complainant need not show direct proof of intentional discrimination and that a statistical disparity shifts the burden to the employer to show evidence of non-discrimination, the Board does not apply this standard. In one case decided in 1973, the Board correctly followed this standard but was reversed by the Commission.[287]

The 1972 Amendments to Title VII gave the Commission express authority to order reinstatement, back pay, and other relief to persons found to be victims of discrimination.[288] Commission regulations provide

---

285. Telephone interview with William Berzak, Chairman, Appeals Review Board, CSC, Nov. 27, 1974. If, however, the record is not sufficiently complete, the Board may remand the case or conduct an independent review.

286. The decisions of the Appeals Review Board are largely ad hoc dispositions which do not refer to prior decisions of the Commission or any substantive rules of law. The Commission does not publish these decisions but merely makes them available at headquarters and certain regional offices.

287. Minutes of the Civil Service Commission, Nov. 14, 1973, reversing Appeals Review Board Decision No. 713-73-465.

288. 42 U.S.C. § 2000e-16(b).

that a person denied employment or promotion shall be given priority consideration for any existing vacancy where the record shows that discrimination existed when the selection was made.[289] However, such persons are not entitled to back pay or other retroactive relief unless the record shows that the person would have been selected but for the impermissible discrimination.[290] The Commission's rule, which places a heavy burden of proof on complainants seeking retroactive relief, is completely contrary to the weight of Title VII case law, which holds that once discrimination has been found, the employer has the burden of showing that the victim would not have been selected even in the absence of the illegal discrimination.[291] As a result of the Commission's restrictive interpretation of the

289. 5 C.F.R. § 713.271.

290. Id. Thus, the Commission has held that where sex discrimination was found in the denial of a promotion to a female complainant, she was not entitled to retroactive relief, even though she was the top ranked candidate for the position, on the grounds that she might have been denied the promotion on grounds other than sex, since hiring officials have some limited discretion. Appeals Review Board, Decision in Case No. 713-74-437, Mar. 14, 1974. Similarly, where racial discrimination was found in the ratings made by a promotion panel, the black complainant, who was ranked second best, was not given back pay or other retroactive relief, since the record did not show that but for the ratings, the complainant would have been selected. Appeals Review Board, Decision in Case No. 713-74-277, Dec. 10, 1973.

291. See, e.g., Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974). In late 1974, a Federal district court ruled that the Commission's standard on retroactive relief was improper. Day v. Weinberger, No. 74-292 (D.D.C. Nov. 4, 1974). The Commission maintains that its position comports with a decision by the Court of Claims in 1971, Chambers v. United States, 451 F.2d 1045 (Ct. Cl. 1971). Hampton letter, supra note 7. However, the district court in Day v. Weinburger specifically noted that the Chambers decision was no longer applicable because it was rendered prior to the passage of the 1972 amendments to Title VII.

remedial authority it has been given in Title VII, full relief is rarely provided to discriminatees. In fiscal year 1973, retroactive relief was provided in 22 (or 3 percent) of 778 cases in which action was taken to correct discrimination.[292]

Thus, it is clear that Federal Title VII complainants face severe disadvantages throughout the complaint process. The allegedly discriminatory agency not only has control over the content of the complaint's allegations but over the investigation as well. While the complainant has a right to a hearing before an independent examiner,[293] the complainant's rights are limited in that proceeding, and the finding of the hearing examiner is not binding on the agency in most cases. The final decision made by the allegedly discriminatory agency is appealable to the Commission, but is not subject to a review according to Title VII case law. More importantly, the substantive rights guaranteed under Title VII, as well as important Title VII evidentiary and procedural rules, are not available to the Federal complainant. Finally, when a civil action is filed in court, the complainant may well not be

292. Hudson telephone interview, supra note 221. Hampton letter, supra note 7.

293. Since complaints examiners are paid by the allegedly discriminatory agency, an argument could be made that the examiners are not totally independent. Discrimination Complaints Examiners Handbook, supra note 258. The Commission emphasizes, however, that the examiner is referred by the Federal Employee Appeals Authority which is reimbursed by the agency for the examiner's service. Thus, the examiner is not paid directly by the agency. Hampton letter, supra note 7.

given a full trial, but only a review of the administrative record.[294] Three years after the passage of the 1972 Act, it did not appear that the extension of Title VII to Federal employment had led to any meaningful changes in the handling of complaints or the substantive rights of Federal employees to be free from discrimination.[295]

---

294. As of April 1975, the courts were divided on the question of whether Section 717(c) of Title VII, as amended, 42 U.S.C. § 2000e-16(c), gives Federal employees the right to a trial de novo or only to a review of the administrative record. See, e.g., Sperling v. United States, No. 79-1533 (3rd Cir. Apr. 18, 1975); Henderson v. Defense Contract Servs. Administration, 370 F. Supp. 180 (S.D.N.Y. 1973) (holding that a right to a trial de novo exists). Contra Salone v. United States, No. 74-1975 (10th Cir. Feb. 21, 1975); Hackley v. Johnson, 360 F. Supp. 1247 (D.D.C. 1973), Appeal docketed, No. 73-2072, D.C. Cir. Oct. 17, 1973.

295. The Commission maintains that it is incorrect to state that complainants face severe disadvantages throughout its procedures. "The rights of the complainant," the Commission maintains, "are fully safeguarded and the Commission standards are in fact more favorable to the complainant than is required by the courts under Title VII proceedings in the private sector." Hampton letter, supra note 7. In addition, the Commission emphasizes that no Federal court has yet found the procedures inconsistent with Title VII. Id.

Chapter 1

FINDINGS AND CONCLUSIONS

Civil Service Commission (CSC)

1. The United States Civil Service Commission oversees and sets standards governing the civilian personnel practices of the Federal Government, which employs nearly four percent of the Nation's work force. Title VII of the 1964 Civil Rights Act, as amended in 1972, prohibits Federal agencies and departments from discriminating against applicants or employees on the basis of race, color, religion, sex, or national origin. Under Title VII the Commission is responsible for ensuring that Federal employment practices are nondiscriminatory and for reviewing agency affirmative action plans on an annual basis. In addition, the Commission has been charged with enforcing Executive orders since 1965, which require agencies to maintain complaint procedures as well as nondiscriminatory practices.

2. It is the position of the Commission on Civil Rights that the Federal Government should be bound by the same standards on equal employment opportunity and affirmative action as govern the practices of all other employers. However, CSC maintains that it is not required to adhere to the Title VII guidelines established by the Equal Employment Opportunity Commission (EEOC) for all other employers or to follow the affirmative action principles applicable to employers who are Federal contractors.

3. Although Congress expressed deep concern in 1972 that many of the civil service employee selection standards appeared to be discriminatory, the Commission has failed to carry out its responsibility under Title VII

to demonstrate empirically that all Federal examination procedures having an adverse impact on minorities and women are manifestly related to job performance.

a. The Commission has adopted guidelines for demonstrating the job relatedness of examination procedures which are substantially weaker than the guidelines of the Equal Employment Opportunity Commission. The Supreme Court in 1971 gave great deference to the EEOC guidelines, which are applicable to private employers, as well as State and local governments.

b. To screen applicants for entry into major professional and administrative positions, the Commission has developed a new examination, the Professional and Administrative Career Examination (PACE), which has not been demonstrated empirically to be related to job performance or to lack cultural and/or sex bias.

c. The Commission has failed to conduct a systematic analysis to determine if its procedures for evaluating and ranking candidates on the basis of biographical information are discriminatory or to show empirically that such procedures are job related. A study conducted by the General Accounting Office in 1973 included substantial evidence that these procedures were not reliable indicators of job performance.

d. Federal law prohibits hiring officials from considering any candidates other than the top three ranked individuals when hiring from outside the civil service. This "rule of three" is required by statute. Available evidence indicates that CSC's ranking procedures are not reliable indicators of successful job performance and may, in fact, screen out qualified candidates. Nevertheless, the Commission has failed to recommend to Congress that the "rule of three" be modified to permit consideration of all qualified candidates.

e. The Commission has failed to make recommendations to Congress with regard to modifying the requirement that veterans be given preference in selection, although this provision has a clearly discriminatory impact on women.

f. CSC prohibits agencies from making race, sex, or ethnicity a criterion for selection of candidates even when agencies are attempting to adhere to affirmative action goals to eliminate the vestiges of prior discrimination.

4. The Commission's regulations governing complaint procedures to be maintained by agencies deny Federal employees a full and fair consideration of their employment discrimination grievances. The deficiencies in the Commission's previous regulations which were criticized by Congress in 1972 persist in the regulations in effect in early 1975.

a. Strict time limitations imposed on complainants at each stage of the process, as well as other prerequisites, pose serious barriers to Federal employees in bringing complaints. These barriers are not faced by employees who file discrimination charges before the Equal Employment Opportunity Commission.

b. Complainants alleging a pattern or practice of discrimination or discrimination on a classwide basis are not guaranteed the right to a hearing or expeditious investigation.

c. The agency charged with discrimination has the principal control over the framing of complaints, the investigation, and the final decision on complaints brought by their employees or applicants.

d. The Commission's instructions on complaint investigations suffer from a number of significant deficiencies, including the failure to

define discrimination according to Title VII law and to provide adequate guidance on detecting discrimination in the selection process. The guidelines do not provide that complaint investigations consider whether general personnel practices have had a disproportionately adverse impact on the complainant's group. New guidelines in draft stage as of November 1974 would not correct most of the deficiencies in the current instructions.

e. Complainants alleging an individual act of discrimination are given the opportunity to have a hearing, but the hearing provided for in the Commission's regulations is not considered by the Commission to be an adversarial proceeding. Neither substantive nor procedural Title VII law is required to be applied. For example, Title VII case precedent, which holds that statistical evidence of disparities constitutes a prima facie violation of the Act, is not followed in these proceedings. In addition, the complaints examiner is instructed to apply a standard in making a determination which gives the benefit of the doubt to the allegedly discriminatory agency. Moreover, the examiner's determination is merely a recommendation to the accused agency, which has the authority to make the final determination, subject to limited review by the Commission's Appeals Review Board (ARB) and discretionary review by the Commission.

f. The Appeals Review Board, in issuing decisions on employment discrimination matters, has not followed the substantive Title VII law and, in some cases, has adopted interpretations of law inconsistent with Title VII.

g. Although Title VII provides Federal complainants the right to file a civil action in Federal district court, a number of courts have limited this proceeding to a review of the administrative record, while other courts have permitted Federal plaintiffs a trial de novo.

h. Although the 1972 Amendments to Title VII gave the Commission additional authority to provide retroactive relief to victims of discrimination, such relief appears to be provided in only three percent of the instances in which action is taken to correct discrimination.

5. The Commission's guidelines on agency affirmative action plans are deficient and clearly inferior to similar procedures applicable under Executive Order 11246, as amended, to private employers which are Government contractors. In addition, the Commission's reviews of agency affirmative action plans are inadequate.

a. The Commission's affirmative action guidelines fail to require agencies to conduct adequate analyses for determining if underutilization of minorities and women exists in their work forces, although such a requirement is expected of all Federal contractors under Executive Order 11246.

b. In contrast to Government contractors, Federal agencies are not required to establish goals and timetables for eliminating underutilization of minorities and women. Although the Commission's statistics indicate that serious underutilization of these groups exists in the higher-level positions at most agencies, few voluntarily set goals and timetables for eliminating these disparities. The Commission has failed to issue adequate instructions on the proper development of goals and timetables. Agencies which voluntarily establish objectives appear to set them so low as to preclude the agency from ever eliminating the underutilization which it has identified. At least one agency established a hiring goal which led to a decrease in the percentage of the class whose employment the agency had intended to increase.

c. The Commission fails to require adequate reporting on the effects of affirmative action measures on the employment of minorities and women; as a result, there is little, if any, evidence that affirmative action plans are accomplishing meaningful improvement in the status of these groups.

d. Many agencies fail to submit their affirmative action plans within the time required by the Commission, as well as fail to adhere to the Commission's instructions on conducting assessments of equal opportunity deficiencies. Of 17 national affirmative action plans reviewed, none included adequate assessments. Nevertheless, the Commission approved the vast majority of these plans without ordering any corrective revisions.

6. The Commission is responsible for conducting periodic reviews of agency employment practices to determine compliance with all applicable laws and regulations, including merit system requirements and Title VII. This evaluation program suffers from a number of deficiencies.

a. The Commission evaluates no more than 15 percent of all Government installations per year.

b. The Commission's guidelines for staff conducting evaluations are inadequate. These guidelines do not give instructions for systematic investigation to determine if agency hiring, placement, and promotion practices have a disproportionately adverse impact on minorities and women.

c. A review of reports on 13 such evaluations found that the Commission routinely fails to consider patterns and practices which may constitute systemic discrimination. In addition, when the Commission found discriminatory practices, it failed to order the agency to provide relief to the victims of such discrimination, despite specific authorization to do so in Title VII.

Chapter 1

RECOMMENDATIONS

Civil Service Commission

We recommend that the President issue an Executive order directing the Civil Service Commission, within six months, to change its current operations to ensure that the Federal Government adheres to the same equal opportunity and affirmative action standards as are applicable to other employers. The Executive order should state that in implementing the recommendations set forth below the Commission's actions will be subject to the approval of the Equal Employment Opportunity Commission (EEOC).

1. The Commission should take steps to ensure that all employee selection methods used by the Federal Government conform to Title VII standards, as delineated by the Equal Employment Opportunity Commission.

a. The Commission should begin immediately to conduct analyses of all Federal selection procedures having an adverse impact on women and minorities to determine whether the standards applied for hiring, placement, and promotion can be demonstrated empirically to be related to job performance and to lack cultural and/or sex bias. Further, even if discriminatory standards are shown to have empirical validity, they must not be used unless the Commission demonstrates that less discriminatory selection standards are inapplicable.

b. The Commission should undertake this analysis in coordination with the Equal Employment Opportunity Commission and independent experts in the field of selection standards validation. The Commission should make public all reports of its analyses.

c. The Commission should recommend to Congress legislation to remove any limitations on its ability to eliminate discriminatory selection standards.

(1) The Commission should recommend to Congress the

serious modification in the law requiring preferential treatment of veterans needed to reduce its extremely discriminatory effect on women by providing that veterans preference in Federal employment be available to individuals on a one-time basis only within five years after discharge from the service.

(2) The Commission should recommend to Congress elimination of the "rule of three," to permit hiring officials to select from a wider range of candidates, since current ranking and testing procedures are unreliable and may unjustifiably screen out qualified minorities and women.

d. The Commission should adopt rules permitting agencies to make race, ethnicity, or sex a criterion of selection when hiring or promoting individuals in accordance with an affirmative action plan designed to eliminate underutilization of minorities and women. Underutilization shall be considered resolved at the point at which there is representation equivalent to the numbers in the available work force.

2. The Commission should issue completely revised complaint procedures which provide Federal employees charging discrimination a full and fair proceeding consistent with Title VII standards.

a. The Commission should adopt the same procedures governing the filing of charges as those used by EEOC, allowing complainants to allege continuing discrimination, providing for less strict time limitations, and treating within the scope of the initial complaint all issues like and related to the specific allegation made by the individual.

b. All complaints should be processed according to the same procedures, regardless of whether they allege a particular act of discrimination or systemic discrimination against an individual or a class.

c. The informal counseling period should be made optional, since it serves to delay the formal proceeding.

d. The Commission should provide on request free legal assistance to complainants of all grades.

e. All investigations should be conducted by an independent office within the Commission according to investigation procedures consistent with Title VII standards.

(1) The Commission should establish an office of investigations with investigators trained in employment discrimination matters.

(2) The Commission should adopt investigation procedures designed to cover all forms of discrimination, including employment practices which have a disparate impact on minorities and women. In establishing these procedures, the Commission should consult with the EEOC and the Wage and Hour Division of the Department of Labor.

f. Complainants should be given the right to obtain all information relevant to the complaint or relevant to the obtaining of information bearing on the complaint. The standard of relevance should be that contained in Rule 26 of the Federal Rules of Civil Procedure. Agency denials of requests for information should be appealable to hearing examiners.

g. All hearings should be conducted before independent hearing examiners according to procedures adequate for protecting Title VII rights.

(1) Certification of hearing examiners should be based on demonstrated expertise in Title VII law.

(2) Hearing examiners should be reimbursed by the Commission rather than by the accused agency.

(3) Complainants should be given the right to subpoena witnesses and documentary evidence.

(4) Any agency official accused in a complaint should be given the right to participate in the proceeding on the complaint as a party in interest.

(5) While strict rules of evidence should not be applied so as to handicap complainants unskilled in the law, nevertheless, all evidence which would be admissible in a court of law considering a Title VII case should be admitted in the administrative hearing.

(6) Substantive Title VII law, as defined by the Federal courts, should be required to be followed.

h. Decisions of hearing examiners should be binding on the accused agency unless reversed by the Appeals Review Board.

i. The Appeals Review Board should apply Title VII precedents in reviewing appeals.

j. The Commission should recommend to the Department of Justice that the Federal Government as defendant in Title VII actions take the position that plaintiffs are entitled to a trial de novo.

3. The Commission should adopt affirmative action regulations modeled after Revised Order No. 4 of the Office of Federal Contract Compliance (OFCC) of the Department of Labor so that Federal agencies are required to adhere to affirmative action standards equivalent to those expected of Federal contractors.

a. Agencies should be required annually to conduct thorough analyses of their work forces to identify disparities between the employment of women and minorities in each agency job title and the availability of these groups in the labor market with job-related qualifications. Such analyses should consider each major minority group (for example, blacks, Mexican Americans, Puerto Ricans, Asians, and Native Americans) separately and by sex, as well as nonminority women.

b. Agencies should be required to establish ultimate goals for eliminating any identified disparities and annual hiring and promotion objectives for obtaining these goals.

c. The Commission should require agencies to review annually their ultimate goals and to report annually on the extent to which annual numerical objectives have been accomplished and whether ultimate goals have been revised.

d. Other components of agency affirmative action plans, such as descriptions of training or recruitment programs, should be submitted only every two or three years unless the agency fails significantly to meet its numerical objectives.

4. The Commission should substantially increase the frequency and quality of its evaluations of agency employment practices.

a. The Commission should conduct an evaluation of more than 25 percent of all Federal facilities with more than 100 full-time employees to determine compliance with the requirements of Title VII.

b. Evaluation reviews should include a systematic investigation to determine if agency hiring, placement, or promotion practices have a disproportionately adverse impact on minorities and women.

c. Where such impact is determined, the Commission should identify all individual members of the class affected and should order the agency to provide relief to these individuals in the form of back pay and preferential status for hiring, transfer, or promotion purposes.

Supreme Court, U. S.
FILED
OCT 7 1975
MICHAEL RODAK, JR., CLERK

No. 74-768

In the Supreme Court of the United States

OCTOBER TERM, 1975

CLARENCE BROWN, PETITIONER

v.

GENERAL SERVICES ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
REX E. LEE,
Assistant Attorney General,
LAWRENCE G. WALLACE,
Deputy Solicitor General,
MARK L. EVANS,
Assistant to the Solicitor General,
ROBERT E. KOPP,
JOHN E. VILLA,
KARL S. ROSENGARD,
Attorneys,
Department of Justice,
Washington, D.C. 20530

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Statute and regulations involved	2
Statement	2
Summary of argument	7
Argument:	
I. Section 717 of the Civil Rights Act of 1964 provides the exclusive judicial remedy for federal employment discrimination claims, and petitioner's complaint was properly dismissed as untimely under the provisions of that section	15
A. The Act establishes a comprehensive plan for eliminating federal employment discrimination and adjudicating discrimination complaints	15
B. Section 717 was enacted with the understanding that it would provide the sole statutory basis for judicial review of federal employment discrimination claims	19
C. Permitting aggrieved federal employees to maintain actions despite their failure to comply with the requirements of Section 717 would defeat the legislative policy embodied in that section	27

Argument—continued
II. Even if petitioner's failure to comply with the time requirements of Section 717 is not a bar to this action, his complaint was properly dismissed for failure to exhaust the available administrative remedies— Page 34
A. Exhaustion of available administrative remedies is a precondition to the filing of an action seeking relief from alleged federal employment discrimination ---------- 36
1. The policies underlying the exhaustion doctrine are applicable to federal employment discrimination claims- 36
2. There is no reason broadly to exempt all federal employment discrimination claims from the exhaustion requirement ---------- 43
B. Petitioner was not excused from the exhaustion requirement because of delay in processing his formal complaint or because an appeal would have been "futile"---------- 55
Conclusion ---------- 59
Appendix A---------- 1a
Appendix B---------- 19a
Appendix C---------- 53a

CITATIONS

Cases:

Aircraft & Diesel Equipment Corp. v. *Hirsch*, 331 U.S. 752---------- Page 37
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 ----------8–9, 20, 26, 47
Baum v. *Zuckert*, 342 F. 2d 145--------- 23
Blaze v. *Moon*, 440 F. 2d 1348---------- 23
Christian v. *New York State Department of Labor*, 414 U.S. 614---------- 13, 51, 58
Congress of Racial Equality v. *Commissioner*, 270 F. Supp. 537---------- 23
DeLong v. *Hampton*, 422 F. 2d 21--------- 23
Eisen v. *Eastman*, 421 F. 2d 560, certiorari denied, 400 U.S. 841---------- 52
Far East Conference v. *United States*, 342 U.S. 570---------- 47
Gnotta v. *United States*, 415 F. 2d 1271, certiorari denied, 397 U.S. 934--------- 22
Goldberg v. *Kelly*, 397 U.S. 254---------- 51
Hargett v. *Summerfield*, 243 F. 2d 29, certiorari denied, 353 U.S. 970---------- 23
Johnson v. *Railway Express Agency, Inc.*, No. 73–1543, decided May 19, 1975------ 9, 20, 26, 27, 52
Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409 ---------- 26
McGee v. *United States*, 402 U.S. 479---- 13, 14, 47, 54
McKart v. *United States*, 395 U.S. 185---- 14, 42, 43, 54
Morton v. *Mancari*, 417 U.S. 535--------- 26
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41---------- 36–37
Ogletree v. *McNamara*, 449 F. 2d 93------ 23
Pelicone v. *Hodges*, 320 F. 2d 754-------- 23

Cases—continued

	Page
Penn v. *Schlesinger*, 497 F. 2d 970, petition for a writ of certiorari pending, No. 74–476	43
Preiser v. *Rodriguez*, 411 U.S. 475	9, 28, 29, 30, 33, 34
Renegotiation Board v. *Bannercraft Clothing Co.*, 415 U.S. 1	53
Richardson v. *Morris*, 409 U.S. 464	35
Schlesinger v. *Councilman*, 420 U.S. 738	43, 46–47
Sullivan v. *Little Hunting Park, Inc.*, 396 U.S. 229	27
Tillman v. *Wheaton-Haven Recreation Assn.*, 410 U.S. 431	27
United States Alkali Export Assn. v. *United States*, 325 U.S. 196	52
United States v. *Ruzicka*, 329 U.S. 287	44
United States v. *Sing Tuck*, 194 U.S. 161	55
Weinberger v. *Salfi*, No. 72–214, decided June 26, 1975	37, 42, 47–48

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 701–706	22
Civil Rights Act of 1866, 14 Stat. 27, as amended, 42 U.S.C. 1981, *et seq.*	4, 10
Civil Rights Act of 1964, Title VII, 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. (Supp. III) 2000e, *et seq.*	2, 4, 7, 8, 9, 19, 20, 21, 22, 25, 26, 33, 1a
Sec. 701(b)	22, 1a
Sec. 706	52, 8a
Sec. 706(f)	17, 9a
Sec. 706(f)(3)	16, 9a, 10a
Sec. 706(f)–(k)	17, 9a–11a

Statutes and regulations—continued

	Page
Sec. 706(g)	17, 11a
Sec. 706(k)	18, 11a
Sec. 717	*passim*, 16a
Sec. 717(a)	15, 16a
Sec. 717(b)	15, 16, 37, 50, 17a
Sec. 717(c)	4–5, 16, 17, 56, 17a
Sec. 717(d)	16, 17, 18a
Sec. 717(e)	18, 27, 18a
Declartory Judgment Act, 28 U.S.C. 2201, *et seq*	4
Mandamus Act, 28 U.S.C. 1361	22
Tucker Act:	
28 U.S.C. 1346	22
28 U.S.C. 1346(a)	4
28 U.S.C. 1346(b)	4
28 U.S.C. 1331	22
28 U.S.C. 1343(4)	4
Civil Service Commission Equal Opportunity Regulations, 5 C.F.R. 713.220(a) (1971)	55
Civil Service Commission Equal Opportunity Regulations (1974):	
5 C.F.R. Part 713	2, 16, 37, 19a
5 C.F.R. 713.213(a)	38, 29a
5 C.F.R. 713.214(a)(1)	38, 30a
5 C.F.R. 713.214(b)	41, 31a
5 C.F.R. 713.216(a)	38, 32a
5 C.F.R. 713.216(b)	38, 33a
5 C.F.R. 713.217(a)	39, 34a
5 C.F.R. 713,217(b)	39, 34a
5 C.F.R. 713.218(a)	39, 35a
5 C.F.R. 713.218(b)	39, 36a
5 C.F.R. 713.218(c)(2)	39, 36a
5 C.F.R. 713.218(e)	39, 37a

Civil Service Commision Equal Opportunity Regulations (1974)—continued

Page

5 C.F.R. 713.218(f) ---------- 39, 38a
5 C.F.R. 713.218(g) ---------- 40, 38a
5 C.F.R. 713.220(a) ---------- 42, 56, 39a
5 C.F.R. 713.220(c) ---------- 42, 40a
5 C.F.R. 713.220(d) ---------- 42, 40a
5 C.F.R. 713.221 ---------- 40, 41a
5 C.F.R. 713.231 ---------- 6, 43a
5 C.F.R. 713.234 ---------- 40, 44a
5 C.F.R. 713.235 ---------- 41, 44a
5 C.F.R. 713.271(a) ---------- 41, 48a
5 C.F.R. 713.271(b) ---------- 41, 50a

Miscellaneous:

Annual Report of the Director of the Administrative Office of the United States Courts, 1974 (1975) ---------- 58
Comment, *Racial Discrimination in Federal Civil Service,* 38 Geo. Wash. L. Rev. 265 (1969) ---------- 23
118 Cong. Rec. 3368–3369 (1972) ---------- 22
118 Cong. Rec. 3371 (1972) ---------- 9, 25
118 Cong. Rec. 4922 (1972) ---------- 25
118 Cong. Rec. 4929 (1972) ---------- 25
Executive Order 9830, 3 C.F.R., 1943–1948 Comp., pp. 606–624 ---------- 37
Executive Order 9980, 3 C.F.R., 1943–1948 Comp., pp. 720–721 ---------- 37
Executive Order 10577, 3 C.F.R., 1954–1958 Comp., pp. 218–225 ---------- 37
Executive Order 10590, 3 C.F.R., 1954–1958 Comp., pp. 237–239 ---------- 37
Executive Order 10925, 3 C.F.R., 1959–1963 Comp., pp. 448–454 ---------- 37

Miscellaneous—continued

Page

Executive Order 11222, 3 C.F.R., 1964–1965 Comp., pp. 306–311 ---------- 37
Executive Order 11246, 3 C.F.R., 1964–1965 Comp., pp. 339–348 ---------- 37
Executive Order 11375, 3 C.F.R., 1966–1970 Comp., pp. 684–686 ---------- 37
Executive Order 11478, 3 C.F.R., 1966–1970 Comp., pp. 803–805 ---------- 37
Executive Order 11590, 36 Fed. Reg. 7831 (1971) ---------- 37
37 Fed. Reg. 22717 (1972) ---------- 56
Hearings on H.R. 1746 before the General Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 1st Sess. (1971) ---------- 23–24
Hearings on S. 2515, *et al.,* before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. (1971) ---------- 23, 24
H.R. Conf. Rep. No. 92–899, 92d Cong., 2d Sess. (1972) ---------- 25
H.R. Rep. No. 92–238, 92d Cong., 1st Sess. (1971) ---------- 21, 24, 45
Legislative History of the Equal Employment Opportunity Act of 1972, prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. (1972) ---- 21, 22, 24, 25, 45, 46
Report of the United States Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974* (1975) ---------- 48, 49

Miscellaneous—continued
Rules of the Supreme Court of the United States, Rule 23(1)(c) ---------- Page 35
S. Conf. Rep. No. 92–681, 92d Cong., 2d Sess. (1972) ---------- 25
S. Rep. No. 92–415, 92d Cong., 1st Sess. (1971) ---------- 8, 21, 24, 45–46

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74–768

CLARENCE BROWN, PETITIONER

v.

GENERAL SERVICES ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a–18a) is reported at 507 F. 2d 1300. The opinion of the district court (Pet. App. 1a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1974. The petition for a writ of certiorari was filed on December 20, 1974, and was granted on May 27, 1975 (A. 67a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 717 of the Civil Rights Act of 1964 provides the exclusive judicial remedy for federal employment discrimination claims.

2. Whether, if Section 717 is not exclusive, petitioner's complaint was properly dismissed for failure to exhaust administrative remedies.

STATUTE AND REGULATIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. 2000e, *et seq.*, is set forth in Appendix A to this brief, *infra*, pp. 1a–18a. Portions of the statute that were amended in 1972 appear in italics.

The Civil Service Commission's Equal Opportunity Regulations, 5 C.F.R. Part 713, are set forth in Appendix B to this brief, *infra*, pp. 19a–52a.

STATEMENT

1. Petitioner, a black employee of the General Services Administration, filed an administrative complaint on July 15, 1971 (A. 15a), alleging that he had been denied a promotion on the basis of race. After preparation and review of an investigative report, a Regional Administrator notified petitioner on October 19, 1972, that there was no evidence of racial discrimination (A. 30a–31a). The letter stated that "the selection for advancement was made from among the best qualified candidates" and that "[t]here is not sufficient evidence in the complaint file to indicate either administrative errors in the selection of Robert Ownbey or racial discrimination against you" (A. 30a).

Petitioner requested a hearing before a certified complaints examiner from another agency (A. 33a). The hearing was held in December 1972, and in February 1973 the complaints examiner issued his findings and recommended decision (A. 34a–42a). He found that "the manner, extent, and degree of an employee's cooperation is a reasonable factor which could be considered by a selecting officer when attempting to choose between two otherwise equally-qualified individuals," that "the evidence contains ample basis for the opinion of complainant's supervisors that he was not *fully* cooperative," and that "the basis for Mr. Brown's nonselection lay in his lack of full cooperation, and was not due to discrimination because of his race" (A. 41a; emphasis in original).

The General Services Administration thereafter issued its final decision determining that the evidence did not support petitioner's complaint of racial discrimination (A. 43a–44a). Petitioner received written notification of that decision, together with a copy of the transcript of the hearing and the findings and recommended decision of the complaints examiner, on March 26, 1973 (A. 45a). The letter of notification advised petitioner that he could appeal the decision to the Civil Service Commission within 15 days of receipt of the letter or challenge the decision by commencing an action in federal district court within 30 days.

Petitioner did not appeal to the Civil Service Commission and did not commence an action in federal district court within 30 days (Pet. Br. 6; Pet. App. 6a).

2. On May 7, 1973—42 days after he received notice of GSA's final decision—petitioner filed a complaint in the United States District Court for the Southern District of New York alleging that he was denied a promotion on the basis of his race and seeking "injunctive orders, damages, costs, attorney's fees and back pay" (A. 1a, 14a). The complaint purported to invoke the district court's jurisdiction under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (Supp. III) 2000e, *et seq.*, "with particular reference to § 717 * * *, covering discrimination in federal employment" (A. 3a). It also alleged that jurisdiction was conferred by the general federal question statute, 28 U.S.C. 1331, the Declaratory Judgment Act, 28 U.S.C. 2201, *et seq.*, and the Civil Rights Act of 1866, as amended, 42 U.S.C. 1981, *et seq.* (A. 3a–4a).[1]

Respondents moved to dismiss the complaint for lack of subject matter jurisdiction (A. 18a–19a), and the district court granted the motion (Pet. App. 1a).

3. The court of appeals affirmed (Pet. App. 2a–18a). It held first that Congress intended Section

[1] Petitioner's motion (A. 48a–49a) for leave to amend his complaint to allege additional bases of jurisdiction under 28 U.S.C. 1343(4) and 1346(a) and (b), and to add an allegation that more than $10,000 was in controversy, was denied by the district court (A. 62a). The court of appeals did not review the denial of the motion, and petitioner does not seek review of the denial in this Court.

717(c) to be the exclusive judicial remedy for federal employment discrimination claims. That remedy, the court reasoned, is retroactively available to any federal employee, such as petitioner, whose administrative complaint was pending at the time Section 717(c) became effective on March 24, 1972. Since petitioner's complaint was untimely under Section 717(c), it was properly dismissed (Pet. App. 9a–15a). The court stated (*id.* at 13a; footnote omitted):

> We hold that there is no "manifest injustice" in the retroactive application of the statute to Brown's complaint. Twice he was notified in letters from the GSA of the procedure for obtaining court review of the agency decision. Both letters gave notice of the 30 day filing requirement. His counsel have not suggested any excuse for the delay in filing the complaint—either in their briefs, or in oral argument, particularly in response to a direct question by the Court concerning such delay. Instead, his counsel argue that the statute does not apply because Brown has not complied with it. In a sense, he is correct in that he cannot take advantage of the statute because he has not complied with its terms. This failure is fatal to Brown's claim, since * * * Congress intended Section 717(c) to be the exclusive judicial remedy for federal employee discrimination grievances.

Alternatively, the court held that even if Section 717(c) were not the exclusive remedy and petitioner were not bound by the 30-day filing requirement, the complaint was properly dismissed because petitioner

inexcusably failed to exhaust his available administrative remedies by appealing GSA's final decision to the Civil Service Commission, as provided by 5 C.F.R. 713.231 (Pet. App. 16a–17a). The court stated that, even if "exhaustion of federal administrative remedies may not be required in every case of alleged discriminatory federal employment practices" (*id.* at 16a), there is no reason to depart from the general exhaustion requirement in this case (*id.* at 16a–17a):

> [W]e cannot say that an appeal to the CSC might not have resulted in granting the relief sought by Brown. * * *
>
> Moreover, it cannot be said here that the administrative remedies available to Brown were inadequate or futile. * * * Administrative regulations in effect at the time Brown filed his complaint in the district court (and which remain in effect) provided for retroactive promotion with back pay if discrimination was found. 5 C.F.R. § 713.271(b) (1974), 37 Fed. Reg. 22,717 (1972). This essentially is the relief sought in his federal court action. Nor does Brown claim that he had no notice of the appellate relief available (he received two letters so informing him), or that his attempts to seek administrative remedies were frustrated.[2]

[2] In light of its decision, the court found it "unnecessary to consider appellant's claims that jurisdiction can be founded on 28 U.S.C. § 1361 (1970) (mandamus); the Administrative Procedure Act, 5 U.S.C. §§ 701–06 (1970); the Tucker Act, 28 U.S.C. § 1346(a) and (b) (1970); and 42 U.S.C. § 1981 (1970) and 28 U.S.C. § 1343(4) (1970)" (Pet. App. 15a–16a, n. 13).

SUMMARY OF ARGUMENT

Petitioner's complaint was correctly dismissed for two reasons. First, it was untimely under Section 717 of the Civil Rights Act of 1964.[3] Although petitioner seeks to invoke other statutory bases of jurisdiction under which, he contends, his complaint was not untimely, Section 717 was intended by Congress to be the exclusive judicial remedy for federal employment discrimination claims. Second, even if Section 717 were not exclusive, petitioner's action would be barred because he failed to exhaust the administrative remedy provided by the Civil Service Commission's regulations. Section 717's relaxation of the usual exhaustion rule is unavailable to petitioner, because he did not file his complaint within the time specified by that section.

I

A. Section 717 establishes a comprehensive scheme for enforcing its proscription of employment discrimination in the federal civil service, a scheme that differs significantly from that established by Title VII to enforce a similar proscription of discrimination in the private sector. Unlike the Equal Employment Opportunity Commission (which has conciliation and litigation authority but which is not empowered to adjudicate complaints or award administrative relief),

[3] Section 717 was added by the Equal Employment Opportunity Act of 1972. The provisions of Title VII of the Civil Rights Act of 1964, as amended, are reproduced in full, with italics to indicate the amendments and additions made by the 1972 Act, in Appendix A to this brief, *infra*, pp. 1a–18a.

the Civil Service Commission is authorized by Section 717(b) to enforce the ban on federal employment discrimination "through appropriate remedies, including reinstatement or hiring of employees with or without back pay * * *."

Congress addressed each facet of the enforcement scheme. The Act requires an aggrieved person to file his claim of discrimination initially with the responsible agency, gives him a right to appeal the agency's decision to the Civil Service Commission, permits him at several stages of the administrative process to file a civil action to review his claim, and authorizes the district court, upon a finding of intentional discrimination, to grant injunctive and other appropriate relief.

B. The comprehensiveness of the enforcement mechanism reflects a congressional judgment that the Act would, for the first time, provide a statutory basis for judicial review of federal employment discrimination claims. Congress did not undertake explicitly to repeal any of the statutes that petitioner seeks to invoke, because it determined that under existing law "an aggrieved Federal employee does not have access to the courts" (S. Rep. No. 92–415, 92d Cong., 1st Sess. 16 (1971)). It accordingly fashioned a remedial scheme with the understanding that it would stand alone as the exclusive means of enforcing the prohibition against federal employment discrimination.

The legislative history of Section 717 is thus quite different from that of the non-federal remedial provisions of Title VII. As this Court observed in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, and *Johnson* v. *Railway Express Agency, Inc.*, No. 73–1543, decided May 19, 1975, Congress recognized that non-federal employees already had access to the courts under other statutes, and it established an independent remedy designed to supplement the existing remedies and to operate as one portion of a larger remedial scheme. Unlike the non-federal provisions of Title VII, Section 717 is not "premised on the continued existence and vitality of other remedies" (118 Cong. Rec. 3371 (1972) (remarks of Senator Williams)), and reflects no congressional "intent to accord parallel or overlapping remedies" (*Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 47).

C. Petitioner argues that all the provisions of Section 717—including its exhaustion requirements, time limitations, and remedial restrictions—may be wholly disregarded at the option of an aggrieved person who determines to invoke some other allegedly available statutory remedy. But that would upset the balance struck by Congress when it enacted Section 717 and would defeat its policy of encouraging the development of effective and expeditious administrative remedies for claims of federal employment discrimination.

Petitioner seeks to invoke the broad language of other statutes to avoid the explicit requirements of later and more specific legislation comprehensively designed to provide the kind of remedy he seeks for the kind of injury he alleges. As in *Preiser* v. *Rodriguez,* 411 U.S. 475, where state prisoners seeking

504-115 O - 75 - 2

immediate or expedited release from confinement attempted unsuccessfully to avoid the exhaustion requirements of the federal habeas corpus statute by invoking provisions of the Civil Rights Act of 1866, "[i]t would wholly frustrate explicit congressional intent to hold that [petitioner] could evade [the statutory] requirement[s] by the simple expedient of putting a different label on [his] pleadings" (411 U.S. at 489–490). Congress has determined that Section 717 "is the appropriate remedy" for federal employment discrimination claims, "and that specific determination must override the general terms" of the statutes relied on by petitioner (*id.* at 490).

II

Even if Section 717 were not exclusive and an action within its purview could properly be brought under other statutes,[4] petitioner cannot maintain this action because he failed to exhaust the administrative appellate remedy provided by the Civil Service Commission's regulations.

A. The Civil Service Commission's Equal Opportunity Regulations establish a three-tiered procedure for the investigation, conciliation, and adjudication of employment discrimination claims. The aggrieved person initially consults with an Equal Employment

[4] We do not address petitioner's lengthy argument concerning the availability of relief under the other statutes he relies upon, because the difficult questions raised by that argument were not decided by the court of appeals, were not specifically presented in the petition for a writ of certiorari, and, in our view, should not now be resolved by this Court (see note 18, *infra*).

Opportunity Counselor in his agency who provides counseling and seeks an informal resolution of the matter.

If resolution is not achieved, the aggrieved person may file a formal complaint with his agency. After completion of a prompt and thorough investigation, and a further opportunity for informal resolution, the complainant is apprised of the agency's proposed disposition of the complaint and of his right to a hearing if he is not satisfied with that disposition. At the hearing, which is conducted by an impartial complaints examiner certified by the Civil Service Commission, the complainant may be represented by counsel, may present evidence, and may cross-examine witnesses. The complaints examiner submits his findings and recommendations to the head of the agency, whose decision is made on the basis of information in the investigative file and hearing record. The decision must give specific reasons for rejecting or modifying the complaints examiner's recommended decision.

The complainant then has the right to appeal the agency's decision to the Civil Service Commission, whose Appeals Review Board considers the entire file and issues a written decision affirming or reversing the agency's decision or remanding to the agency for further investigation or rehearing.

The regulations authorize broad remedial action by the agency or the Commission upon a finding of discrimination, including, where appropriate, reinstatement, hiring, promotion, back pay awards, and cancellation of any adverse action.

The policies served by the traditional rule that judicial relief is unavailable unless prescribed administrative remedies have been exhausted are fully applicable to the Commission's complaint procedures. Full exhaustion of those procedures is necessary to prevent premature interference with the administrative process and to permit the federal agencies and the Civil Service Commission to correct their own errors, apply their expertise to the facts of each case, and compile a record for possible judicial review. Moreover, pursuit of an administrative remedy through which suitable relief may be obtained may obviate judicial intervention or narrow the scope of any necessary judicial review.

Petitioner argues that the Commission's elaborate procedure need not even be commenced, much less exhausted, by any federal employee who chooses to bring an action under statutes other than Section 717. The reasons he gives for such an unprecedented across-the-board exception to the usual exhaustion rule do not support his contention.

Contrary to petitioner's assertions, the resolution of employment discrimination claims depends on an expert understanding of federal civil service personnel management problems, and Congress for that reason determined in 1972 to give the Civil Service Commission administrative jurisdiction over such claims and to strengthen its authority and broaden its responsibilities. Where, as here, the disposition of an administrative claim "depends on careful factual analysis" calling for the application of agency expertise, it is

impermissible to "sidestep * * * the administrative process designed to marshal relevant facts and resolve factual issues in the first instance" (*McGee* v. *United States,* 402 U.S. 479, 488).

There is no basis for petitioner's assertion that resort to the administrative process is futile. This is not a case in which the issues to be resolved are beyond the Commission's competence to decide or in which the nature of the relief sought is beyond the Commission's authority to award. Nor is it accurate to say that claims are almost certainly to be denied. A large proportion of the claims are resolved informally to the satisfaction of the complainant; many others are resolved favorably to the complainant after formal adjudication. Petitioner has not demonstrated that a meritorious complaint is likely to be denied or that a successful complainant is unlikely to obtain appropriate relief.

While reasonable persons may disagree over the fairest and most effective administrative procedures for adjudicating employment discrimination claims, Congress left the resolution of that question to the Commission. The procedures it adopted cannot accurately be characterized as so grossly unfair as to excuse their invocation. Indeed, even when one seeks to attack agency procedures as in violation of due process standards, exhaustion of those procedures is a prerequisite. *Christian* v. *New York State Department of Labor,* 414 U.S. 614.

To accept petitioner's contention that exhaustion is never required would encourage "frequent and de-

liberate flouting" of the administrative complaint procedure (*McKart* v. *United States*, 395 U.S. 185, 195) and would "jeopardize * * * the functional autonomy of the administrative bod[y] on which Congress has conferred the primary responsibility" to adjudicate claims of federal employment discrimination (*McGee* v. *United States, supra*, 402 U.S. at 487).

B. Petitioner's failure to invoke his right to appeal the agency's decision to the Civil Service Commission is therefore a bar to the present action. Though he argues that his agency's delay in reaching a final decision in his case excused him from further exhaustion, he did not complain of that delay to the Civil Service Commission in accordance with the regulations that were then in force, and he should not be heard to complain of it now.

Although Section 717 permits aggrieved persons to file a civil action without first appealing to the Civil Service Commission, that exception to the traditional exhaustion requirement is inapplicable here, because petitioner failed to satisfy the statutory condition of that exception—that the complaint be filed within 30 days of notification of the agency's decision.

Petitioner argues that an administrative appeal would have been futile. But his argument is not supported by the statistics he cites, which show only that the Appeals Review Board affirms agency decisions more often than it reverses them.

ARGUMENT

I

SECTION 717 OF THE CIVIL RIGHTS ACT OF 1964 PROVIDES THE EXCLUSIVE JUDICIAL REMEDY FOR FEDERAL EMPLOYMENT DISCRIMINATION CLAIMS, AND PETITIONER'S COMPLAINT WAS PROPERLY DISMISSED AS UNTIMELY UNDER THE PROVISIONS OF THAT SECTION

A. THE ACT ESTABLISHES A COMPREHENSIVE PLAN FOR ELIMINATING FEDERAL EMPLOYMENT DISCRIMINATION AND ADJUDICATING DISCRIMINATION COMPLAINTS

Section 717 of the Civil Rights Act of 1964, as added by Section 11 of the Equal Employment Opportunity Act of 1972, 86 Stat. 111, 42 U.S.C. (Supp. III) 2000e–16, proscribes federal employment discrimination and establishes a comprehensive administrative and judicial enforcement scheme.

Section 717(a) provides that all personnel actions affecting federal employees and applicants for federal employment[5] "shall be made free from any discrimination based on race, color, religion, sex, or national origin." Section 717(b) gives the Civil Service Commission the authority to enforce the provisions of subsection (a) "through appropriate remedies, in-

[5] The section excludes from its coverage aliens employed outside the limits of the United States and employees of the General Accounting Office. It also excludes persons employed by those units of the Government of the District of Columbia and federal legislative and judicial branches that do not have positions in the competitive service.

cluding reinstatement or hiring of employees with or without back pay," and to issue appropriate rules or regulations[6] to carry out its responsibilities under the section.[7]

Section 717(c) gives an aggrieved employee or applicant the right to file a civil action in a federal district court to review his claim of employment discrimination.[8] That right is conditioned, however, upon compliance with timing and exhaustion requirements.

The complainant is required to file his claim initially with the department or agency that has allegedly discriminated against him. If the final decision by the department or agency is adverse, the complainant has a right to appeal to the Civil Service Commission. Alternatively, he may, within 30 days of his receipt

[6] The Commission's equal employment opportunity regulations are codified at 5 C.F.R. Part 713. Section 717(b) of the Act directs the head of each department, agency, or unit to comply with the Civil Service Commission's regulations.

[7] Section 717(b) also provides that each department and agency shall submit to the Commission annually, for its review and approval, an "equal employment opportunity plan" designed "to maintain an affirmative program of equal employment opportunity * * *." The Commission is made responsible for reviewing and evaluating the operation of all such programs, and it is directed to consult with interested individuals and organizations concerning equal employment opportunity.

[8] Section 706(f)(3), 42 U.S.C. (Supp. III) 2000e–5(f)(3), incorporated by Section 717(d), gives the federal district courts jurisdiction over such actions. It provides that an action may be brought in any district in the State in which the discrimination allegedly occurred, in the district in which the relevant employment records are maintained, or in the district in which the aggrieved person would have worked but for the alleged discrimination.

of notice of the department's or agency's final decision, file a civil action directly without appealing to the Civil Service Commission. If he does appeal to the Commission, he may file a civil action within 30 days after receiving notice of the Commission's final decision. In addition, the complainant may file a civil action if, after 180 days from the filing of his initial charge or the filing of his appeal, the department or agency, or the Civil Service Commission, has not yet taken final action on the charge or the appeal.[9]

Civil actions brought under Section 717 are governed by the provisions of Section 706(f) through (k), 42 U.S.C. (Supp. III) 2000e–5(f)–(k), which are incorporated "as applicable" by Section 717(d). In addition to providing for jurisdiction and venue (see note 8, *supra*), Section 706(f) requires that cases be expedited and authorizes the district court to appoint an attorney for the complainant and to allow the action to be commenced without the payment of fees and costs. Section 706(g) authorizes the district court, on a finding that the agency intentionally engaged in unlawful discrimination, to grant injunctive and other appropriate relief, including back pay for a period not to exceed two years prior to the filing of the initial

[9] Section 717(c) also expressly waives sovereign immunity by providing that in a civil action under the section "the head of the department, agency, or unit, as appropriate, shall be the defendant." Petitioner's complaint named as defendants the General Services Administration and three subordinate officials of that agency (A. 3a). Petitioner thereafter sought to amend the complaint (see note 1, *supra*) to add as defendants the Civil Service Commission and the complaints examiner (A. 50a, 52a).

administrative complaint. Section 706(k) gives the district court discretion to allow the complainant, if he prevails, a reasonable attorney's fee as part of the costs.

Finally, Section 717(e) provides that every government agency and official shall retain "primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or * * * under Executive Order 11478 * * *."

Congress thus addressed each facet of the enforcement mechanism. The Act defines with precision the employees and applicants covered and the nature of the discrimination that may be challenged. It establishes an administrative complaint and appeal procedure, specifies the administrative remedies that may be prescribed, imposes both a limited exhaustion requirement and specific time limitations for the filing of a civil action to review the administrative determination, provides for jurisdiction and venue, waives sovereign immunity, specifies certain extraordinary procedures to be followed by the district court, and defines the scope of the district court's remedial authority.

It is undisputed that petitioner's action was untimely under Section 717. After receiving notice of his agency's final decision rejecting his discrimination complaint, petitioner neither appealed to the Civil Service Commission nor filed a civil action within 30 days. He argues that the action nevertheless may be maintained under other statutes that do not impose a 30-day limitation period.

B. SECTION 717 WAS ENACTED WITH THE UNDERSTANDING THAT IT WOULD PROVIDE THE SOLE STATUTORY BASIS FOR JUDICIAL REVIEW OF FEDERAL EMPLOYMENT DISCRIMINATION CLAIMS

Petitioner would have this Court hold that the carefully constructed enforcement scheme established by Section 717 may be ignored altogether if the federal employee merely invokes any of the "diverse arsenal of remedies" (Br. 43) that allegedly were available before the enactment of Section 717. Under those pre-existing remedies, according to petitioner (Br. 43 and nn. 81 and 82): (1) *any* federal employee may bring a civil action seeking relief from alleged federal employment discrimination; (2) an aggrieved employee need exhaust *no* available administrative remedy before filing such an action; (3) an action may be filed without regard to the 30-day limitation period established by Section 717; and (4) the district court may award back pay without regard to the two-year limit under Title VII and may also award compensatory and punitive damages against the government and individual officials.

If these other remedies were available at the time Section 717 was enacted, and if, as petitioner argues, Congress intended that they survive the 1972 enactment, why then did Congress fashion so delicately balanced an enforcement scheme containing procedural and remedial limitations that make it a less attractive remedy in important respects? Petitioner's only answer is that Section 717, unlike the other statutes upon which he relies, "provides for awards of attorneys' fees, court appointed counsel, and waiver

of court costs, features which we may presume are particularly important to aggrieved federal employees of limited resources" (Br. 43, n. 81). While we do not dispute petitioner's presumption, we doubt that Congress intended to create so elaborate a mechanism for so limited a purpose, in effect exacting a substantial procedural and remedial price only from those aggrieved individuals who need the benefits of court-appointed counsel and waiver of court costs.

Petitioner relies upon this Court's decision in *Johnson* v. *Railway Express Agency, Inc.*, No. 73–1543, decided May 19, 1975. The Court there held, in the non-federal employment context, that, "[d]espite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief" (slip op. 5).

That holding, however, rests upon the explicit legislative history of the 1964 Act, which unequivocally reflects "a congressional intent to allow [a non-federal employee] to pursue independently his rights under both Title VII and other applicable state and federal statutes" (*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48). As the Court in *Johnson* noted (slip op. 5), the Committee Reports made clear "that the remedies available to the individual under Title VII are co-extensive with the indivdual's [*sic*] right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures

augment each other and are not mutually exclusive." H.R. Rep. No. 92–238, 92d Cong., 1st Sess. 19 (1971); see also S. Rep. No. 92–415, 92d Cong., 1st Sess. 24 (1971).

Petitioner argues that, "[s]ince Title VII did not repeal the section 1981 rights of private employees, it necessarily follows that Title VII did not repeal the section 1981 and other pre-existing rights of federal employees" (Br. 40; footnote omitted). But there is no necessary comparability between the direct judicial remedy (after an opportunity for conciliation efforts) established by Title VII for non-federal employees and the comprehensive system of full administrative remedies and judicial review thereof established by Title VII for federal employees (see note 15, *infra*). In any event, the legislative history of Section 717, unlike that of the 1964 Act, reflects no explicit, or even implicit, congressional intent to preserve any pre-existing judicial remedies for federal employment discrimination.[10] What it does reveal is that Congress thought it was writing on a blank slate and conceived of Section 717 as the sole statutory basis for judicial review of federal employment discrimination complaints.

---

[10] Congress rejected in 1972 an amendment proposed by Senator Hruska that would have made Title VII "the exclusive remedy of any person claiming to be aggrieved by an unlawful employment practice of an employer, employment agency, or labor organization." (The text of the amendment is reproduced in *Legislative History of the Equal Employment Opportunity Act of 1972*, prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. 1382 (1972),

When Congress was considering the 1972 legislation, there was at best considerable doubt that federal employees could obtain judicial review of employment discrimination complaints. In a case in which an employee claimed he had been wrongfully denied a promotion, *Gnotta* v. *United States,* 415 F. 2d 1271 (C.A. 8), certiorari denied, 397 U.S. 934, the court held that sovereign immunity barred a federal employment discrimination suit that predicated jurisdiction on the Administrative Procedure Act (5 U.S.C. 701–706), the Mandamus Act (28 U.S.C. 1361), and the Tucker Act (28 U.S.C. 1346). The court in *Gnotta* stated that a suit against the United States seeking a promotion is barred because "[t]he plaintiff has not demonstrated that the United States has consented to be sued"; the same rule applies when

---

hereinafter referred to as "Legislative History.") The proposed amendment, however, would have applied only in the non-federal context; neither the United States nor any federal department or agency is included within the Act's definition of "employer." See Section 701(b), 42 U.S.C. 2000e(b). See also 118 Cong. Rec. 3368–3369 (1972), Legislative History 1395–1398 (remarks of Senator Hruska). Contrary to petitioner's suggestion (Br. 42), therefore, no inference from the rejection of the Hruska amendment can properly be drawn concerning congressional intent with respect to the exclusivity of Section 717.

Petitioner relies (Br. 38–39) on language in the Senate Report and remarks on the floor of the Senate to the effect that Section 717 would give federal employees the same right that is granted to private employees to bring a civil action under Title VII. Those statements imply neither an intention to preserve, nor even a recognition of, any pre-existing remedies. They suggest only an intention to allow federal employees, like employees in the private sector, to obtain judicial review of their employment discrimination claims under the provisions of Title VII.

individual federal officers are named defendants, the court stated, because granting the relief sought "would compel those individuals to promote the plaintiff, with the natural effect a promotion has upon the Treasury, and to exercise administrative discretion in an official personnel area" (415 F. 2d at 1277). See also *Ogletree* v. *McNamara,* 449 F. 2d 93 (C.A. 6), in which the court held that sovereign immunity barred a challenge to the Air Force merit promotion program. Compare *Congress of Racial Equality* v. *Commissioner,* 270 F. Supp. 537 (D. Md.). See generally Comment, *Racial Discrimination in Federal Civil Service,* 38 Geo. Wash. L. Rev. 265 (1969).

The courts of appeals were in conflict over whether federal employees complaining of wrongful discharge were entitled to judicial review. Compare *Pelicone* v. *Hodges,* 320 F. 2d 754 (C.A. D.C.), and *DeLong* v. *Hampton,* 422 F. 2d 21 (C.A. 3), with *Blaze* v. *Moon,* 440 F. 2d 1348 (C.A. 5). Such review as was available did not necessarily extend to an examination of the facts. See *Hargett* v. *Summerfield,* 243 F. 2d 29 (C.A. D.C.), certiorari denied, 353 U.S. 970; *Baum* v. *Zuckert,* 342 F. 2d 145 (C.A. 6).

Hearings before the Committees of both Houses in 1971 evinced congressional concern over the apparent inability of federal employees to obtain judicial review of employment discrimination complaints. See, *e.g.,* Hearings on S. 2515, *et al.,* before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. 296, 301, 308, 318 (1971) (hereinafter "Senate Hearings"); Hearings on H.R. 1746 before the General Subcommittee

on Labor of the House Committee on Education and Labor, 92d Cong., 1st Sess. 320, 322, 385–386, 391–392 (1971) (hereinafter "House Hearings"). Much of the testimony was in conflict. Irving Kator, representing the Civil Service Commission, stated his view that, after exhaustion of administrative remedies, the aggrieved federal employee had a limited right to judicial review of an employment discrimination complaint. House Hearings 385–386. See also *id.* at 320, 322; Senate Hearings 308, 318. Other witnesses expressed their doubts on that score. See Senate Hearings 296; House Hearings 391–392.

Ultimately, the Committees concluded that judicial review was not available at all or that access was doubtful and that some forms of relief were definitely foreclosed. Thus, the Senate Report stated: "The testimony of the Civil Service Commission notwithstanding, the committee found that an aggrieved Federal employee does not have access to the courts." S. Rep. No. 92–415, 92d Cong., 1st Sess. 16 (1971), Legislative History 425. And the House Committee observed (H.R. Rep. No. 92–238, 92d Cong., 1st Sess. 25 (1971), Legislative History 85):

> There is serious doubt that court review is available to the aggrieved Federal employee. Monetary restitution or back pay is not attainable. In promotion situations, a critical area of discrimination, the promotion is often no longer available.

The point was reiterated during debate on the Senate floor. Senator Cranston, co-author of the amendment relating to federal employment, stated

that it would, "[f]or the first time, permit Federal employees to sue the Federal Government in discrimination cases * * *." 118 Cong. Rec. 4929 (1972), Legislative History 1744. See also 118 Cong. Rec. 4921 (1972), Legislative History 1723. Senator Williams, sponsor and floor manager of the bill, stated that it "provides, for the first time, to my knowledge, for the right of an individual to take his complaint to court." 118 Cong. Rec. 4922 (1972), Legislative History 1725. Nothing in the Committee Reports or the floor debates contradicts the views of Senators Cranston and Williams.

The Conference Committee accepted the Senate amendment. Its Reports described Section 717 as "providing *the* statutory basis for * * * appeal or court access * * *." H.R. Conf. Rep. No. 92–899, 92d Cong., 2d Sess. 21 (1972), Legislative History 1841 (emphasis added); S. Conf. Rep. No. 92–681, 92d Cong., 2d Sess. 21 (1972), Legislative History 1819 (emphasis added).

The legislative history of Section 717 is thus quite unlike that of the 1964 Act. The judicial remedy for non-federal employees under Title VII was enacted with the express intention of supplementing the other statutory remedies that Congress recognized as already available to such individuals. It was designed as one part of a comprehensive remedial scheme. The 1972 amendments relating to non-federal employees were likewise "premised on the continued existence and vitality of other remedies for employment discrimination" (118 Cong. Rec. 3371 (1972), Legislative History 1403 (remarks of Senator Williams)).

594-115 O - 75 - 3

Section 717, by contrast, was enacted with the understanding that no other judicial remedies were available for federal employees. It was not "premised on the continued existence and vitality of other remedies" (*ibid.*) but was designed to stand alone as a comprehensive enforcement scheme in itself. Thus, while Congress of course did not undertake expressly to repeal existing statutes that it concluded were inapplicable,[11] it intended Section 717 exclusively to govern judicial review of federal employment discrimination claims within its purview.

The present case therefore differs not only from *Johnson* v. *Railway Express Agency, Inc., supra,* but also from the other cases petitioner cites to illustrate "the general policy of providing * * * a variety of remedies for the protection of important civil rights" (Br. 41–42). In each of those cases, the Court was able to infer from the statute and its legislative history a congressional "intent to accord parallel or overlapping remedies against discrimination" (*Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 47).[12] No such in-

[11] Petitioner invokes the established rule that repeals by implication are not favored (Br. 41–42). See *Morton* v. *Mancari*, 417 U.S. 535, 549–551. But that rule is not a meaningful guide to legislative intent in circumstances such as these, where Congress clearly expressed its understanding that there was nothing to repeal.

[12] We adverted above (pp. 20–21, *supra*) to the legislative history of Title VII as applied to non-Federal employees, which plainly reveals an intent "to supplement, rather than supplant, existing laws and institutions relating to employment discrimination" (*Alexander* v. *Gardner-Denver Co., supra*, 415 U.S. at 48–49). Similarly, in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, the Court found compelling indications in the legislative history of the Fair Housing Title of the Civil Rights Act of 1968 that Congress was aware of the overlapping provisions of 42 U.S.C. 1982 and nevertheless concluded that additional legislation was needed (see 392 U.S. at 413–417). In *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, the Court held that the public accommodations provisions of Title II of the Civil Rights Act of 1964 did not supersede the provisions of 42 U.S.C. 1982. As the Court noted (396 U.S. at 237–238), that Title included a savings clause that expressly preserved the right of individuals to pursue other remedies under statutes barring discrimination in public accommodations (42 U.S.C. 2000a–6(b)). In *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. 431, the Court found it unnecessary to consider whether a statutory exemption under Title II of the Civil Rights Act of 1964 implied that the application of 42 U.S.C. 1982 should be similarly limited (see 410 U.S. at 438–439).

[13] Petitioner points (Br. 41) to Section 717(e), which provides that nothing in the Act "shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or * * * under Executive Order 11478 * * *." But that language does not bear upon the existence or preservation of any other judicial remedies. We know of nothing in the legislative history, and petitioner cites nothing, to suggest that Section 717(e) was intended to preserve statutory remedies that Congress determined were non-existent.

tent may be inferred from Section 717 or its legislative history.[13]

C. PERMITTING AGGRIEVED FEDERAL EMPLOYEES TO MAINTAIN ACTIONS DESPITE THEIR FAILURE TO COMPLY WITH THE REQUIREMENTS OF SECTION 717 WOULD DEFEAT THE LEGISLATIVE POLICY EMBODIED IN THAT SECTION

As this Court stated in *Johnson* v. *Railway Express Agency, Inc., supra,* "[a]lthough any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecu-

tion of stale ones" (slip op. 10). The time requirements of Section 717 reflect a general congressional judgment that expedition in resolving federal employment discrimination claims is desirable. The section provides that civil actions alleging federal employment discrimination must be filed within 30 days after notification of the agency's final decision or of the Civil Service Commission's final action on appeal, but that if action on the initial charge or the appeal is delayed beyond 180 days, then a suit may be commenced at any time before such final action is taken.

Petitioner chose not to file a complaint before his agency issued its final decision, and he neither invoked the available appeal mechanism nor commenced this action within the 30 days allowed by statute. Permitting the action to be maintained in these circumstances would nullify the legislative policy underlying Section 717's time requirements.

The situation here is analogous to that in *Preiser* v. *Rodriguez,* 411 U.S. 475. The issue there was whether state prisoners challenging the fact or duration of their confinement and seeking immediate or expedited release from imprisonment may obtain equitable relief under 42 U.S.C. 1983, despite the availability of a clearly and specifically applicable remedy under the federal habeas corpus statute, 28 U.S.C. 2254. The availability of federal habeas corpus is conditioned upon the applicant's exhaustion of state judicial remedies, and the prisoners in *Rodriguez* sought to avoid that requirement by invoking the provisions of the Civil Rights Act. Like petitioner in the present case, they argued that, "since their complaints plainly came

within the literal terms of [the Civil Rights] statute, there is no justifiable reason to exclude them from the broad remedial protection provided by that law" (411 U.S. at 488).

The Court stated, however, that "[t]he broad language of § 1983 * * * is not conclusive of the issue before us. The statute is a general one, and, despite the literal applicability of its terms, the question remains whether the specific federal habeas corpus statute, explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement, must be understood to be the exclusive remedy available in a situation like this where it so clearly applies" (*id.* at 489). When Congress amended the habeas corpus laws in 1948, it "clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief under those laws" (*ibid.*). The Court accordingly concluded (*id.* at 489–490):

> It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings. In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.

The same analysis is applicable here. Like the prisoners in *Preiser* v. *Rodriguez,* petitioner here invokes the broad language of the Civil Rights Act in an effort to avoid an explicit requirement of a later and more

specific statute comprehensively designed to provide precisely the kind of remedy he seeks for precisely the kind of injury he alleges. As in *Rodriquez,* it would "wholly frustrate explicit congressional intent" to permit petitioner to evade the clearly applicable 30-day time requirement of Section 717 "by the simple expedient of putting a different label on [his] pleadings" (*ibid.*). In the absence of legislative history to the contrary, the specific provisions of Section 717, like the specific federal habeas corpus statute in *Rodriguez,* "must be understood to be the exclusive remedy available in a situation like this where it so clearly applies" (*id.* at 489).[14]

Although the circumstances of this case only partially illustrate the other consequences that would fol-

[14] The considerations of federal-state comity that account for the exhaustion rule in federal habeas corpus actions obviously differ from the considerations underlying the time requirements of Section 717 (which were designed in large part to encourage the development of expeditious and effective administrative remedies). But that difference does not mean that the analysis in *Preiser* v. *Rodriguez* is inapplicable here. The Court's emphasis on comity considerations in *Rodriguez* was in response to a contention that the policy of the exhaustion requirement, and therefore the requirement itself, is inapplicable when the prisoner is challenging the actions of a state administrative body rather than of a state court. This Court concluded that the underlying policy was broader than merely avoiding unnecessary interference by one court with the courts of another sovereign and that the exhaustion requirement was fully applicable to the prisoners' challenges (411 U.S. at 490–492). There is here no doubt that Section 717's time requirement is applicable. Nothing in the *Rodriguez* opinion suggests that a clearly applicable statutory requirement may be ignored if its underlying policy is different from, or relatively less important than, the comity principles underlying the federal habeas corpus exhaustion rule.

low from petitioner's theory, his contention is that a federal employee alleging unlawful discrimination may file a civil action not only in disregard of the express time requirements of Section 717 but also without first presenting his complaint to his own agency at all.

Congress struck a delicate balance between the competing objectives of permitting aggrieved federal employees to obtain prompt judicial review of their discrimination claims and giving the federal government an opportunity to keep its own house in order by adjudicating such claims in the first instance. It determined that no civil action should be filed until the employee's agency has had a reasonable opportunity to consider the claim. The judicial remedy was not to be invoked until the agency either reached a final decision or failed to do so within 180 days. Similarly, while determining that an appeal to the Civil Service Commission should be optional rather than mandatory, Congress concluded that, once such an appeal is filed, judicial review should not be available until the Commission takes final action or fails to do so within 180 days.

Petitioner says, however, that this meticulously designed structure—obviously intended to encourage the development of effective and expeditious administrative remedies for federal employment discrimination—can be wholly disregarded at the employee's option if he simply determines to invoke some other judicial remedy. "Under remedies other than Title VII, particularly section 1981, a federal employee would not be subject to the limited exhaustion requirement of section 717(c)" (Br. 43, n. 81). We ar-

gue in the following section of this brief that Section 717 in fact represents a relaxation of the otherwise applicable exhaustion requirements, and that a federal employment discrimination suit under any other allegedly applicable statute could not be commenced without first invoking *all* available administrative remedies, including an appeal to the Civil Service Commission.

Under petitioner's theory, however, a federal employee would be free to go immediately to court without first apprising even his own agency of his claim of discrimination. Alternatively, he could file a complaint with his agency, await the outcome of an investigation or the commencement of a hearing, and then decide to file a judicial action without awaiting the agency's final decision or the passing of 180 days. He would be free also to abort an appeal by filing an action without awaiting a decision under the administrative appeal procedures he invoked. Even after a final agency decision, or indeed a final administrative decision by the Civil Service Commission, he presumably could file an independent suit raising the same claim *de novo,* rather than a suit under Section 717 for review of the administrative decision [15]—thus frustrating the congressional scheme to strengthen the development of the administrative remedies. In sum, the employee would be free to file an action irrespective of the Section 717 procedures, so long as he did

[15] The question whether a complainant who brings a civil action under Section 717 is entitled to a full trial *de novo* in the district court is presented in three petitions for writs of certiorari pending in this Court. *Chandler* v. *Johnson*, No. 74–1599; *Salone* v. *United States*, No. 74–1600; *United States* v. *Sperling*, No. 75–247.

so within the time provided by the applicable state statute of limitations.[16]

Surely this is not what Congress had in mind when it enacted Section 717. If, as in 1964, Congress had clearly expressed its determination that the existence of such overlapping remedial schemes would be consistent with its objectives in enacting the Title VII remedy, this would be a different case. In creating the enforcement scheme for federal employees, however, Congress did not envision that the procedures so clearly spelled out in the statute could thus be disregarded or aborted by any federal employee who chose not to follow them, and thus that thousands of federal employment discrimination complaints (see Pet. Br. 53; App. 9aa) could be filed directly in the federal district courts each year.

Petitioner's theory would effectively nullify the requirements of the statute and would defeat the congressional policy for the development of effective administrative remedies that those requirements reflect. Congress has determined that Section 717 is the appropriate mechanism to be used by federal employees claiming unlawful discrimination. As in *Preiser* v. *Rodriguez, supra,* 411 U.S. at 490, "that specific determination must override the general terms" of the other statutes that petitioner purports to invoke.[17]

[16] Petitioner states that the New York limitations period applicable to this case is three years and that some states allow a shorter period (Br. 47–48 and n. 91).

[17] Petitioner also argues that an employee who elects to proceed under statutes other than Section 717 "would be entitled in appropriate circumstances to punitive or compensatory damages against the government officials individually" (Br. 43, n. 81). Without

II

EVEN IF PETITIONER'S FAILURE TO COMPLY WITH THE TIME REQUIREMENTS OF SECTION 717 IS NOT A BAR TO THIS ACTION, HIS COMPLAINT WAS PROPERLY DISMISSED FOR FAILURE TO EXHAUST THE AVAILABLE ADMINISTRATIVE REMEDIES

If the Court agrees with our contention that Section 717 is the sole statutory basis for judicial review of federal employment discrimination claims, it need not consider petitioner's contention that exhaustion of administrative remedies is unnecessary under statutes other than Section 717, because the complaint in this case was concededly filed out of time under that

conceding the correctness of that contention, we note that the Court in *Preiser* v. *Rodriguez*, *supra*, responded to a similar claim concerning the availability of damages under Section 1983 by emphasizing that the exclusivity of the habeas corpus procedure applies only to actions challenging the fact or duration of confinement and seeking immediate or speedier release. A damages claim, the Court ruled, would not fall within the purview of the habeas corpus remedy and could be pursued under the Civil Rights Act without the need for exhausting state remedies (411 U.S. at 493–494). Assuming, *arguendo*, that petitioner could successfully overcome potential jurisdictional and official immunity obstacles to pursuing a separate claim for damages against individual federal officials, it may be that a similar answer would be appropriate in this context.

Petitioner, however, did not specifically seek such damages in this case, and, while his complaint included a broad prayer for "such relief as may be appropriate, including * * * damages" (A. 14a), the question of the availability of such relief against individual officers was not considered by the court of appeals and is not among the questions presented in the petition for a writ of certiorari in this case.

section. Our argument in this portion of the brief is predicated on the assumptions that Section 717 is not exclusive and that an action alleging federal employment discrimination may properly be brought under one or more of the other statutes invoked by petitioner.[18]

We submit, on those assumptions, that petitioner's failure to appeal to the Civil Service Commission the General Services Administration's final decision rejecting his claim of racial discrimination is a bar to his present action. Although Section 717 authorizes an aggrieved federal employee to file a civil action without first invoking the established administrative

[18] Petitioner argues at length (Br. 11–37) that jurisdiction is conferred by five different statutes enacted prior to the enactment of Section 717. Whether those statutes confer subject matter jurisdiction and whether they constitute waivers of sovereign immunity with respect to federal employment discrimination claims are difficult questions. Although they were briefed and argued in the court of appeals, that court found it unnecessary to resolve them in view of its disposition of the case (see note 2, *supra*). Moreover, while petitioner's brief on the merits describes the first question presented as whether "jurisdiction over this action [is] conferred by statutes enacted prior to the adoption in 1972 of section 717 of Title VII" (Br. 1), the petition for a writ of certiorari presented the different question whether Section 717 repealed *pro tanto* four of the five statutes that petitioner now seeks to invoke (Pet. 2).

Even if the question framed by the brief is properly considered to be "fairly comprised" within the question presented by the petition (see Rule 23(1)(c) of the Rules of this Court), we submit that, if the Court concludes that Section 717 is not exclusive and that petitioner's failure to exhaust the available administrative remedies is not a bar to this action, it should remand the case to the court of appeals to permit that court to consider the jurisdiction and sovereign immunity issues in the first instance. See, *e.g.*, *Richardson* v. *Morris*, 409 U.S. 464.

appeal procedure, that statute represents a conditional relaxation of the usual rule that available administrative remedies must be pursued to their conclusion at the highest administrative level. Since petitioner did not file his action within the 30 days allowed by Section 717, he failed to satisfy the condition and was required to exhaust the administrative appellate remedy before seeking judicial review.

Petitioner's argument that he is entitled to maintain this action notwithstanding his failure to exhaust administrative remedies takes two forms. First, he contends broadly that *no* administrative remedies need be exhausted by a federal employee challenging alleged employment discrimination under statutes other than Section 717 (Br. 44–61). Second, he contends that his agency's delay in processing his initial charge excused him from invoking further administrative remedies (Br. 61–65). Neither contention withstands scrutiny.

A. EXHAUSTION OF AVAILABLE ADMINISTRATIVE REMEDIES IS A PRECONDITION TO THE FILING OF AN ACTION SEEKING RELIEF FROM ALLEGED FEDERAL EMPLOYMENT DISCRIMINATION

1. The policies underlying the exhaustion doctrine are applicable to federal employment discrimination claims.

Petitioner's effort to obtain judicial review of his discrimination claim without having invoked the Civil Service Commission's appeal procedure "is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted" (*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51). For it is settled that the exhaustion doctrine "does not require merely the initiation of prescribed administrative procedures"; it requires "pursuing them to their appropriate conclusion and * * * awaiting their final outcome before seeking judicial intervention" (*Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U.S. 752, 767).

"[T]he doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue" (*Weinberger* v. *Salfi,* No. 74–214, decided June 26, 1975, slip op. 13). The Civil Service Commission's administrative scheme, established pursuant to its authority under Section 717(b) of the Civil Rights Act of 1964 and a series of Executive Orders proscribing discriminatory employment practices in the federal civil service,[19] provides comprehensively for the investigation, conciliation, and adjudication of federal equal employment opportunity complaints.

The Commission's Equal Opportunity Regulations, as amended in October 1972, 5 C.F.R. Part 713,[20]

---

[19] See Executive Order 9830, 3 C.F.R., 1943–1948 Comp., pp. 606–624; Executive Order 9980, 3 C.F.R. 1943–1948 Comp., pp. 720–721; Executive Order 10577, 3 C.F.R., 1954–1958 Comp., pp. 218–225; Executive Order 10590, 3 C.F.R. 1954–1958 Comp., pp. 237–239; Executive Order 10925, 3 C.F.R., 1959–1963 Comp., pp. 448–454; Executive Order 11222, 3 C.F.R., 1964–1965 Comp., pp. 306–311; Executive Order 11246, 3 C.F.R., 1964–1965 Comp., pp. 339–348; Executive Order 11375, 3 C.F.R., 1966–1970 Comp., pp. 648–686; Executive Order 11478, 3 C.F.R., 1966–1970 Comp., pp. 803–805; Executive Order 11590, 36 Fed. Reg. 7831 (1971).

[20] The regulations are reproduced in Appendix B to this brief, *infra*, pp. 19a–52a.

provide that a person who believes he has been discriminated against on the basis of race, color, religion, sex, or national origin may, within 30 days of the matter causing him to believe he has been discriminated against, consult with an Equal Employment Opportunity Counselor in his agency, who makes inquiry into the matter, seeks an informal resolution of it, and counsels the aggrieved person. 5 C.F.R. 713.213(a), 713.214(a)(1)(i). If the matter has not been resolved after the Counselor's final interview with the aggrieved person or after 21 days, whichever comes first, the person must be informed in writing of his right to file a formal discrimination complaint within 15 days from receipt of the notice. 5 C.F.R. 713.213(a), 713.214(a)(1)(ii).

If a complaint is filed, the agency's Director of Equal Employment Opportunity initiates a prompt investigation, to be conducted by a person outside the jurisdiction of the head of the part of the agency in which the complaint arose. 5 C.F.R. 713.216(a). The investigator is charged with conducting "a thorough review of the circumstances under which the alleged discrimination occurred" (*ibid.*), and he is empowered to require the cooperation of all agency employees and the giving of sworn testimony by all employees having knowledge of the matter under investigation. 5 C.F.R. 713.216(b).

When the investigative file is completed, it is furnished to the complainant, who is then afforded a fresh opportunity to discuss the matter with appropriate officials and to resolve the complaint informally. 5 C.F.R. 713.217(a). If the matter is not resolved, the complainant must be notified in writing of the proposed disposition of the complaint, of his right to a hearing and decision by the agency head if such a request is made within 15 days, and of his right to a decision by the agency head without a hearing. 5 C.F.R. 713.217(b).

If a hearing is requested, it is conducted by a qualified complaints examiner, certified by the Civil Service Commission, who must be an employee of a different agency. 5 C.F.R. 713.218(a). The complaints examiner reviews the investigative file, and, if he determines that further investigation is necessary, may remand the complaint for further investigation or may arrange for the appearance of witnesses necessary to supply the needed information at the hearing. 5 C.F.R. 713.218(b). The complaints examiner is directed to conduct the hearing so as to elicit all "[i]nformation having a bearing on the complaint or employment policy or practices relevant to the complaint * * *." 5 C.F.R. 713.218(c)(2). The complainant may cross-examine witnesses (*ibid.*) and may request that the complaints examiner arrange for the presence as a witness of any federal employee who would furnish pertinent testimony. 5 C.F.R. 713.218(e). The hearing is recorded and transcribed verbatim. 5 C.F.R. 713.218(f).

The complaints examiner thereafter transmits to the head of the complainant's agency his findings of fact and recommended decision, including his recommendations for any appropriate remedial action "with

regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose." 5 C.F.R. 713.218(g).

The agency head makes his decision concerning the complaint on the basis of the information in the complaint file, including the hearing record. The decision is in writing and is sent to the complainant, together with a copy of the complaints examiner's findings and recommendations and a copy of the hearing record. If the decision rejects or modifies the examiner's recommended decision, specific reasons for that action must be given. The complainant must be notified of his right to appeal to the Civil Service Commission within 15 days or to file a civil action within 30 days. 5 C.F.R. 713.221.

Appeals are considered without a hearing by the Commission's Appeals Review Board (formerly the Board of Appeals and Review). The Board reviews the complaint file and all relevant written representations made to it. It may remand a complaint to the agency for further investigation or for a rehearing, or it may arrange for additional investigation to be conducted by Commission personnel. The Board is directed to issue a written decision setting forth the reasons for its action on the appeal and informing the complainant of his right to file a civil action within 30 days. 5 C.F.R. 713.234.

Although the Board's decision is final, the Commissioners may reopen and reconsider any decision upon a showing that new and material evidence is available, that the decision involves an erroneous interpretation of law or misapplication of policy, or that the decision involves new policy considerations of general importance or is otherwise so exceptional as to merit the attention of the Commissioners. 5 C.F.R. 713.235.

The regulations authorize broad remedial action by the agency or the Commission upon a finding of discrimination. In the case of a rejected applicant who would have been hired in the absence of improper discrimination, the agency must offer the applicant employment of the type and grade denied him, together with back pay and employment credit from the date he would have been hired but for the discrimination (but not earlier than two years prior to the filing of the formal administrative complaint). 5 C.F.R. 713.271(a).

In the case of an existing employee who was denied an employment benefit because of improper discrimination, the agency must take whatever remedial measures may be appropriate, including retroactive promotion with back pay (with the same two-year limitation), cancellation of an unwarranted personnel action, or elimination from the agency's records of any reference to an unwarranted disciplinary action. 5 C.F.R. 713.271(b).

The regulations provide that at every stage of the complaint process, including the pre-complaint counseling stage, "the complainant shall have the right to be accompanied, represented, and advised by a representative of his own choosing." 5 C.F.R. 713.214(b).

They also provide that "[t]he complaint shall be resolved promptly"; both the complainant and the agency must "proceed with the complaint without

594-115 O - 75 - 4

undue delay so that the complaint is resolved within 180 calendar days after it was filed * * *." 5 C.F.R. 713.220(a). If an agency has neither issued a final decision nor requested the Commission to supply a complaints examiner within 75 days, "the Commission may require the agency to take special measures to insure prompt processing of the complaint or may assume responsibility for processing the complaint * * *." 5 C.F.R. 713.220(c). If the complaints examiner has submitted a recommended decision finding discrimination and the agency has not issued a final decision within 180 days after the complaint was filed, the recommended decision becomes the final decision binding on the agency 30 days after its submission. 5 C.F.R. 713.220(d).

The important policies that underpin the exhaustion rule are fully applicable to the Commission's administrative scheme and require that an aggrieved person pursue his administrative remedies at each stage of the complaint process, including the appellate stage. Exhaustion is required here, as in other contexts, in order to prevent "premature interruption of the administrative process" (*McKart* v. *United States,* 395 U.S. 185, 193), "so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review" (*Weinberger* v. *Salfi, supra,* slip op. 13). Moreover, "practical notions of judicial efficiency" strongly favor application of the exhaustion requirement; since "[a] complaining party may be successful in vindicating his rights in the administrative process[,] * * * the courts may never have to intervene" (*McKart* v. *United States, supra,* 395 U.S. at 195). Even when judicial intervention is not obviated, "[t]he rule ensures that whatever judicial review is available will be informed and narrowed by the agencies' own decisions" (*Schlesinger* v. *Councilman,* 420 U.S. 738, 756).

2. There is no reason broadly to exempt all federal employment discrimination claims from the exhaustion requirement.

Petitioner seeks a broad and unprecedented exemption from the usual exhaustion requirement that would permit federal employees to obtain judicial review of their employment discrimination claims without even commencing, much less exhausting, the applicable administrative procedures. We know of no case, and petitioner cites none, in which this Court has sanctioned the wholesale bypassing of a federal administrative remedy which, if pursued, could lead to a vindication of the complainant's rights and appropriate administrative relief through adjudicatory processes. There is no reason to take that drastic step here.[21]

Petitioner contends that the Civil Service Commission's complaint procedures may properly be ignored because "[t]he agencies have no particular expertise

[21] Indeed, the only other court of appeals which has considered the issue agreed with the court below that exhaustion of administrative remedies is required. *Penn* v. *Schlesinger*, 497 F.2d 970 (C.A. 5) (*en banc*), petition for certiorari pending, No. 74-476.

to offer" and "the federal courts are considerably more expert in the applicable legal problems" (Br. 49). The Civil Service Commission, however, has had equal employment opportunity enforcement responsibility with respect to the federal civil service since 1965. The adjudication of employment discrimination claims necessarily draws upon, and adds to, the Commission's accumulated expertise in administering the federal government's long-standing non-discrimination policy.

Petitioner mistakenly suggests that the Commission's expertise is limited to matters of "ordinary personnel management" and not "unlawful discrimination" (Br. 49). Evaluating a claim of unlawful discrimination requires an intimate understanding of personnel management. Indeed, the principal investigative and adjudicative inquiry in such cases often is whether the personnel action complained of reflected legitimate management considerations or illegitimate discriminatory considerations. The Commission's fact-finding task is to distinguish between the two, and its expertise naturally extends to the recognition of both.[22]

[22] See *United States* v. *Ruzicka*, 329 U.S. 287, where, in an action by the government to enforce an order of the Secretary of Agriculture requiring a milk handler to pay money into a producer-settlement fund, the Court held that the defendant, having failed to invoke its administrative remedy before the Secretary, could not defend against the action on the ground that the demand to pay was based on a faulty inspection of its accounts and improper tests of its milk. The defendant argued that the district court may not enforce an order not "in accordance with law." The Court, in language applicable by analogy to petitioner's contention concerning unlawful discrimination, responded (329 U.S. at 294): "[W]hether such an order is or is not in accordance with law is not a question that brings its own immediate answer, or even an answer which it is the familiar, everyday business of courts to find. Congress has provided a special procedure for ascertaining whether such an order is or is not in accordance with law. The questions are not, or may not be, abstract questions of law. * * * [T]hey are questions of law arising out of, or entwined with, factors that call for understanding of the * * * industry."

Petitioner asserts that "Congress expressly concluded in 1972 that the Civil Service Commission itself was lacking in such expertise" (Br. 49). What petitioner ignores is that the 1972 Act was designed to build upon the Commission's expertise and to bolster its authority to eliminate federal employment discrimination. Thus, while Congress may not have been fully satisfied in 1971 with the Commission's success in eradicating discrimination, and while the bill proposed by the House Committee would have transferred jurisdiction over federal employment discrimination matters to the Equal Employment Opportunity Commission,[23] the bill passed by the House did not cover federal employees at all,[24] and both Houses ultimately determined to vest continued jurisdiction in the Civil Service Commission and to strengthen its authority and broaden its responsibilities.

The Report of the Senate Committee stated that the "task for the Civil Service Commission is to develop more expertise in recognizing and isolating the various forms of discrimination which exist in the system it administers." S. Rep. No. 92–415, 92d Cong., 1st Sess. 14 (1971), Legislative History 423. It was "[i]n order to assist the Commission in accomplishing

[23] See H.R. Rep. No. 92–238, 92d Cong., 1st Sess. 24–25, 32, 56–57 (1971), Legislative History 84–85, 92, 116–117.

[24] See Legislative History 326–332.

its goals" that the Committee proposed, and Congress adopted, measures "intended to strengthen the enforcement powers of the Civil Service Commission * * *." S. Rep. No. 92–415, *supra,* at 15, Legislative History 424.

The 1972 Act thus represents a congressional judgment that the Civil Service Commission's experience should be the foundation of a strengthened enforcement effort. It is reasonable to assume that the Commission's increased responsibilities and additional enforcement experience since the statute's enactment have enhanced rather than diminished its expertise in employment discrimination matters. To excuse exhaustion of Commission remedies on the ground that the Commission is without expertise would hardly comport with the legislative determination to maintain the Commission as the expert agency in such matters.

Petitioner also contends (Br. 51) that exhaustion is superfluous because there is no need in cases such as the present one for a factual record. But employment discrimination claims obviously turn on the peculiar facts of each case, and a factual record in these cases, no less than in rate-making cases or other administrative agency litigation, is an essential foundation for effective judicial review. Even if an aggrieved person were entitled to *de novo* judicial review of his discrimination claim,[25] the existence of a full administrative record might enable the court to avoid needless evidentiary duplication. See *Schlesinger* v. *Councilman,*

[25] See note 15, *supra.*

supra, 420 U.S. at 756; cf. *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 59–60.

A failure to pursue the established complaint procedures for discrimination claims would, as in *McGee* v. *United States,* 402 U.S. 479, 486, "jeopardize the interest in full administrative fact-gathering and utilization of agency expertise * * *." It proves little to say, as petitioner does, that "[o]nce the facts are established, the conclusions and remedy follow as a matter of law" (Br. 50). Where, as here, the disposition of a claim "depends on careful factual analysis," it is impermissible to "sidestep * * * the administrative process designed to marshal relevant facts and resolve factual issues in the first instance" (*McGee* v. *United States, supra,* 402 U.S. at 488).[26]

Petitioner asserts, however, that resort to the administrative process is futile (Br. 51–54). His contention is that the Commission's complaint process rarely results in awards of back pay or retroactive promotions, that the procedure is ineffective and unfair, and that the regulations do not authorize relief as broad as that to which a person might be entitled in court.

There may, of course, be instances when a failure to exhaust administrative remedies is excused because exhaustion would be futile. In *Weinberger* v. *Salfi,*

[26] Cf. *Far East Conference* v. *United States,* 342 U.S. 570, 574: In "cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined."

supra, for example, full exhaustion was excused because "the Secretary * * * determined that the only issue to be resolved is a matter of constitutional law concededly beyond his competence to decide" (slip op. 15).[27] But federal employment discrimination claims do not ordinarily turn on issues beyond the competence of the Civil Service Commission to decide; nor is the nature of the relief sought ordinarily beyond the Commission's authority to award.

It is one thing to excuse exhaustion in a particular case in which prior administrative consideration of a claim could serve no useful purpose. It is quite another thing to excuse exhaustion across the board for all claimants simply because most claims do not result in the fullest possible administrative relief. In a scheme that emphasizes informal conciliation and authorizes a wide variety of relief appropriate to the particular facts, statistics showing the number of complainants who secure the most extensive relief available through formal adjudication are not especially meaningful.

Thus, while petitioner states that only a handful of complainants were awarded back pay or retroactive promotions in fiscal year 1973 (Br. 52–53),[28] the report on which he relies also shows that only about one out

[27] The Court noted that "a court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary" (*Weinberger* v. *Salfi*, *supra*, slip op. 15).

[28] The actual figure used by petitioner, drawn from a report of the United States Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974* (1975), is incorrectly characterized in petitioner's brief. The report states that "retroactive relief was provided in 22 (or 3 percent) of 778 cases in which

of every ten informal complaints ripens into a formal complaint and that 35 to 45 percent of the informal complaints are followed by some form of corrective action, including promotion, reinstatement, reassignment, and reduction or rescission of adverse action.[29]

action was taken to correct discrimination" (p. 85). The Civil Service Commission official who provided the statistical information to the Civil Rights Commission's telephone interviewer (see p. 85, n. 292) has informed us that the figures relate to final action taken by the various employing agencies on formal complaints and do not include action taken at the informal counseling stage or by the Commission on appeal. The 22 cases—referred to in the report as instances in which "retroactive relief was provided," and in petitioner's brief as instances in which "federal employees received back pay or retroactive promotions" (Br. 53)—actually represent only instances in which employing agencies awarded back pay. The figure does not include awards of retroactive promotions without back pay. We are also informed that the total figure of 778 referred to in the report is inaccurate. The correct figure is 718.

The Civil Service Commission has furnished us with the following figures for fiscal year 1974. There were 2,650 final agency dispositions of formal discrimination complaints, of which 1,410 were decided on the merits, 870 were withdrawn by the complainant (with or without informal resolution), 265 were rejected as untimely or outside the purview of the regulations, and 105 were cancelled for non-prosecution. Agencies took corrective action in 985 (or 43 percent) of the cases decided on the merits or withdrawn by the complainant. In 16 percent of the cases in which corrective action was taken, the complainant was awarded a prospective promotion; in four percent of the cases, he was awarded back pay; in six percent of the cases, he was awarded retroactive promotion. (Where both back pay and retroactive promotion were awarded, the case was counted in both categories.)

[29] *The Federal Civil Rights Enforcement Effort—1974*, *supra*, p. 67 and n. 221. Not all corrective action entails specific relief to the complainant. Included among corrective actions taken by agencies are improvements in personnel practices and in equal employment opportunity practices.

The report also states that the employing agencies made findings of discrimination in 12.8 percent of the formal complaints considered on the merits in fiscal year 1974.[30] A significant proportion of the cases appealed to the Commission resulted in findings of discrimination, reversals of agency decisions on other grounds, or remands for further investigation.[31]

This is not a process that can accurately be characterized as futile. Many complaints that might otherwise be brought to the courts in the first instance are resolved informally to the satisfaction of the complainant. Many others are resolved favorably to the complainant after formal adjudication. Petitioner has not demonstrated that any *meritorious* complaint is likely to be denied or that less than adequate relief is likely to be awarded.

Nor is this a case in which it can be said that the available procedures are so grossly unfair that a complainant should be excused from invoking them. Though reasonable persons may differ concerning the fairest and most effective procedures for the adjudication of discrimination claims, Congress determined to leave the resolution of that question to the Commission by authorizing it in Section 717(b) to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsi-

[30] *Id.* at 79, n. 272. When all final dispositions are taken into account, including rejections and cancellations of complaints, the figure is seven percent. *Id.* at 79. As the figures stated in note 28, *supra*, indicate, corrective action is frequently taken even without a finding of discrimination.

[31] *Id.* at 82. See p. 57, *infra*.

bilities * * *." Some believe that the complaint procedure established by the Commission pursuant to that authority could be improved upon. But that is a matter for the Commission's judgment (or for further congressional consideration).

No one could reasonably contend that the procedures fail to comply with due process standards.[32] Yet this Court has held that even a person claiming that agency procedures are inadequate under the due process clause must first invoke and exhaust those procedures. *Christian* v. *New York State Department of Labor,* 414 U.S. 614.

Even if one assumes, as petitioner does, that some aggrieved persons might obtain broader relief in court than the Commission's regulations authorize, that does not mean that the administrative remedy is futile or ineffectual. The complainant may be successful in securing at least a portion of the relief he seeks administratively, and he may determine at the conclusion of the administrative process that resort to the courts is not necessary. If he elects to file a civil action, the

[32] The regulations provide for the right to a hearing before a qualified, impartial complaints examiner, at which the complainant may be represented by counsel, may cross-examine witnesses, and may present evidence. Testimony is under oath and is recorded verbatim. The complaints examiner must make written findings and recommendations, and, if the agency head rejects or modifies the examiner's recommended decision, he must state his reasons in writing. The complainant has a right to appeal to the Civil Service Commission and to submit additional written information or argument. The Commission must issue a written decision. The regulations thus more than satisfy the minimum standards of procedural due process. Cf. *Goldberg* v. *Kelly*, 397 U.S. 254.

resulting dispute will presumably be narrower than it would otherwise have been. And even if the complainant is unsuccessful administratively, the record compiled by the agency may obviate some of the trial litigation that would otherwise have been required (see p. 46, *supra*).

Petitioner advances several additional reasons for exempting all federal employment discrimination claims from the exhaustion requirement, but none requires extensive comment.

He contends that "[f]ederal employees should not be subjected to the burden of an exhaustion requirement from which all state and private employees are immune" (Br. 46). Even if his premise were correct,[33] the conclusion would not follow from it. Private and state employees do not have access to the elaborate adjudicative procedures made available to federal employees by the Civil Service Commission's regulations, under which an aggrieved person, if successful, can achieve extensive and suitable relief.[34]

---

[33] In *Johnson* v. *Railway Express Agency, Inc.*, *supra*, which involved a private employee's suit alleging employment discrimination under 42 U.S.C. 1981, the Court expressly reserved the question "whether a § 1981 claim of employment discrimination is ever subject to a requirement that administrative remedies be exhausted" (slip op. 3, n. 3). See, also, *Eisen* v. *Eastman*, 421 F.2d 560, 568–569 (C.A. 2), certiorari denied, 400 U.S. 841, discussing the circumstances in which exhaustion of state remedies is required.

[34] The Equal Employment Opportunity Commission has no authority to adjudicate discrimination complaints or to grant the kind of administrative relief that the Civil Service Commission is empowered to award. See Section 706 of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. III) 2000e–5. Cf. *United States Alkali Export Assn.* v. *United States*, 325 U.S. 196, 210.

That the exhaustion requirement "often poses a serious burden on the employee" (Br. 58) is not a reason to dispense with it. See *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24. Indeed, as petitioner admits, the administrative process "is less expensive, less formal, and less time consuming than an ordinary court case" (*ibid.*)—and the employee, of course, has a right to ultimate judicial review.

Petitioner argues that the exhaustion requirement is counterproductive because it would require the courts to devote valuable resources to "resolving scholastic controversies about the 'correct' way to exhaust," when those resources "would be far better spent deciding these cases on the merits" (Br. 57). The clarity and relative simplicity of the Commission's regulations, however, leave little room for doubt concerning the "'correct' way to exhaust." And, while questions concerning the exhaustion of administrative remedies, like other threshold jurisdictional issues, may occasionally occupy the attention of the courts, it is obviously unrealistic to suppose that abandoning the exhaustion doctrine altogether in federal employment discrimination cases would *reduce* the workload of the federal judiciary.

Finally, petitioner asserts that the "requirement of exhaustion may tend to undermine the effectiveness of the administrative process" by encouraging employees who are determined to seek judicial review to "substantially abbreviate it by waiving various aspects of the process" in order to "decrease the likelihood of

any favorable administrative ruling and increase the probability that judicial intervention will be required" (Br. 59–60).[35] On the other hand, says petitioner, the administrative process would be strengthened by giving employees "direct access to the courts" (Br. 61). Since the Commission "would naturally prefer" to avoid court litigation, it would have an incentive to "render [the administrative] process attractive to employees" to encourage its use (*ibid.*).

These fanciful suppositions turn the policy of the exhaustion doctrine on its head. What undermines an administrative process is not its invocation but its "frequent and deliberate flouting" (*McKart* v. *United States, supra,* 395 U.S. at 195). To eliminate the exhaustion requirement would be to encourage not "reform" (Br. 61) but atrophy. It would "jeopardize * * * the functional autonomy of the administrative bod[y] on which Congress has conferred the primary responsibility" to adjudicate claims of federal employment discrimination (*McGee* v. *United States, supra,* 402 U.S. at 487).

Petitioner's notions of administrative autonomy and judicial efficiency are the antithesis of those expressed by this Court in *McKart* and other cases. There is no reason to depart here from the general doctrine that exhaustion of administrative remedies serves rather than disserves those important objectives.

---

[35] Waiving aspects of the administrative process may well amount to a failure to exhaust. See *McGee* v. *United States, supra,* 402 U.S. at 488–491.

B. PETITIONER WAS NOT EXCUSED FROM THE EXHAUSTION REQUIREMENT BECAUSE OF DELAY IN PROCESSING HIS FORMAL COMPLAINT OR BECAUSE AN APPEAL WOULD HAVE BEEN "FUTILE"

It has long been settled that the failure to pursue an available administrative appeal precludes resort to the courts. *United States* v. *Sing Tuck,* 194 U.S. 161. Apart from petitioner's broadside attack on the exhaustion rule generally, he argues more narrowly that he was not required to appeal his agency's decision to the Civil Service Commission because the agency did not issue its final decision until 617 days after he filed his formal complaint (Br. 61–64) and because an appeal to the Commission would have been futile (Br. 64–65).

1. Petitioner should not be heard to complain at this stage of delays in the processing of his formal complaint. The Commission's Equal Opportunity Regulations in force at the time petitioner filed his complaint contemplated that, except in unusual circumstances, agencies would take final action on discrimination complaints within 60 days (excluding time spent in processing complaints by the complaints examiner). 5 C.F.R. (1971 rev.) 713.220(a). They specifically provided, moreover, that administrative relief could be sought from any unnecessary delay (*ibid.*):

> When the complaint has not been resolved within this limit, the complainant may appeal to the [Civil Service] Commission for a review of the reasons for the delay. Upon review of this appeal, the Commission may require the agency to take special measures to insure prompt processing of the complaint or may

accept the appeal for consideration under § 713.234.

Had petitioner been aggrieved by the General Services Administration's delay in processing his complaint, he thus had a suitable administrative remedy before the Civil Service Commission. Petitioner, however, did not seek review of the reasons for the delay.

Moreover, the current provision contemplating a final decision by the agency within 180 days, *including* the time spent in processing the complaint by the complaints examiner (5 C.F.R. 713.220(a)), was promulgated on October 21, 1972 (37 Fed. Reg. 22717), two days after petitioner was notified of his right to a hearing (A. 30a–31a). The agency issued its final decision, after a hearing and the submission of the examiner's findings and recommendations, 153 days after the date on which the new regulations were promulgated.

Petitioner argues that, since Congress in Section 717 authorized the filing of a civil action, without further exhaustion of administrative remedies, after the agency issues its final decision or after 180 days elapse without final agency action, complainants who sue under statutes other than Section 717 should be treated similarly. But petitioner's action would be barred even if he were treated similarly. Section 717 (c) authorizes the filing of an action within 30 days of the agency's final decision or after 180 days from the filing of the initial charge "until such time as final action may be taken * * *." Petitioner did not file this action before his agency issued its final decision,

nor did he file it within 30 days after he was notified of that decision.

Section 717 relaxes the usual exhaustion requirement but imposes strict and clearly defined time restrictions on those who choose to forego the pursuit of further administrative remedies. Petitioner seeks impermissibly to exploit the one while ignoring the other.

2. Petitioner also argues that "an appeal to the Appeals Review Board would be futile" because the Board rarely reverses an agency decision (Br. 64). We have set forth as an appendix to this brief (*infra,* p. 53a) a table of statistics furnished to us by the Civil Service Commission showing the Appeals Review Board's disposition of appeals for fiscal years 1973, 1974, and 1975. As the table indicates, in the most recent fiscal year the Board disposed of 749 appeals, affirming agency decisions in 564 cases (or 75 percent), reversing in 74 cases (or 10 percent), and remanding to the agency in 111 cases (or 15 percent).[36]

These figures do not support petitioner's claim that "the process is little more than an empty ritual" (Br. 65). On the contrary, they reflect a vital, deliberative process in which cases are disposed of according to their merits. That the Board affirms agency decisions more often than it reverses them may mean

[36] The Board affirmed agency findings of no discrimination in 405 cases (or 54 percent of the appeals) and reversed such findings upon determining that discrimination had occurred in 16 cases (or two percent). Of those cases in which the Board affirmed or reversed findings of no discrimination, the reversals constitute four percent.

594-115 O - 75 - 5

only that the agency decisions are correct more often than they are incorrect. It does not mean that the appeal process is futile.[37]

It follows that petitioner's failure to appeal his agency's decision to the Civil Service Commission bars the present action and that the district court therefore correctly dismissed the complaint.[38]

---

[37] The reversal rate in the federal judicial system is also relatively low. But it would be inaccurate to say that an appeal to a court of appeals would be futile in all cases, irrespective of the merits, simply because only 18.6 percent of the judgments appealed from are reversed, or that a petition for a writ of certiorari to this Court would be futile because only six percent of the petitions filed are granted. See Annual Report of the Director of the Administrative Office of the United States Courts, 1974, pp. 193, 367 (1975).

[38] Petitioner argues that, "where a party has not properly exhausted his administrative remedies, the court is not to dismiss the case but merely to stay proceedings while that administrative proceeding is resumed and completed" (Br. 65). The question whether dismissal of the complaint is an appropriate disposition when it appears that the plaintiff has failed to exhaust available administrative remedies was not presented by the petition for a writ of certiorari in this case and should not be considered by this Court.

In any event, dismissal was proper in this case because the time for appealing to the Civil Service Commission had already expired when petitioner filed this action. There is no contention here that petitioner was not given proper notice of the time and manner for filing an appeal. Cf. *Christian* v. *New York State Department of Labor*, *supra*, 414 U.S. at 623–624 and n. 10. Having allowed the time to expire, petitioner may not recapture his lost opportunity simply by filing a civil action that is precluded for failure to exhaust administrative remedies. If that were possible, the integrity of the administrative time restrictions would be undermined.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
REX E. LEE,
Assistant Attorney General.
LAWRENCE G. WALLACE,
Deputy Solicitor General.
MARK L. EVANS,
Assistant to the Solicitor General.
ROBERT E. KOPP,
JOHN K. VILLA,
NEIL H. KOSLOWE,
Attorneys.

OCTOBER 1975.

APPENDIX A

CIVIL RIGHTS ACT OF 1964 AS AMENDED

AN ACT To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1964".

• • • • • • •

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY[1]

DEFINITIONS

SEC. 701. For the purposes of this title—

(a) The term "person" includes one or more individuals, *governments, governmental agencies, political subdivisions,* labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has *fifteen* or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or *any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or* (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, *except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972,* persons having fewer than *twenty-five* employees (and their agents) shall not be considered *employers.*

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the

[1] Includes 1972 amendments made by P.L. 92-261 printed in italic.

purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) *twenty-five* or more during the first year after the *date of enactment of the Equal Employment Opportunity Act of 1972, or* (B) *fifteen* or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, *except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the excercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.*

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of

the Labor-Management Reporting and Disclosure Act of 1959, *and further includes any governmental industry, business, or activity.*

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) *The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's, religious observance or practice without undue hardship on the conduct of the employer's business.*

EXEMPTION

SEC. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, *educational institution*, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, *educational institution*, or society of its *activities*.

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, *or applicants for membership* or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, *or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs*, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment *agency, or joint labor-management committee controlling apprenticeship or other training or retraining, in-*

cluding on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment *agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee* indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. *Members of the Commission* shall be appointed by the President by and with the advice and consent of the *Senate* for a term of five *years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.* The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and *except as provided in subsection (b)*, shall appoint, in accordance with the *provisions of title 5, United States Code, governing appointments in the competitive service, such officers, agents, attorneys, hearing examiners, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: Provided, That assignment, removal, and compensation of hearing examiners shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United States Code.*

(b)(1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 706 and 707 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this title.

(c) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(d) The Commission shall have an official seal which shall be judicially noticed.

(e) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the moneys it has disbursed; and shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this title.

(g) The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;

(6) to *intervene* in a civil action brought *under section 706* by an aggrieved party *against a respondent other than a government, governmental agency, or political subdivision.*

(h) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(i) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 9 of the Act of August 2, 1939, as amended (the Hatch Act), notwithstanding any exemption contained in such section.

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 706. (a) *The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.*

(b) Whenever *a charge is filed by or on behalf of a* person claiming to be aggrieved, or by a member of the Commission, *alleging* that an employer, employment agency, labor *organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,* has engaged in an unlawful employment practice, the Commission shall *serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on* such employer, employment agency, labor *organization, or joint labor-management committee* (hereinafter referred to as the "respondent") *within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges* shall not be made public by the Commission. If the Commission *determines* after such investigation that there is *not* reasonable cause to believe that the charge is true, *it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true,* the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such *informal* endeavors may be made public by the *Commission, its officers or employees, or used as evidence in a subsequent proceeding* without the written consent of the *persons concerned.* Any *person* who *makes* public information in violation of this subsection shall be fined not more than $1,000 or imprisoned *for* not more than one *year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) from the date upon which the Commission is authorized to take action with respect to the charge.*

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts

upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective *date* of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under *this section* shall be filed within *one hundred and eighty* days after the alleged unlawful employment practice *occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter,* except that in *a* case of an unlawful employment practice with respect to which the person aggrieved has *initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof,* such charge shall be filed by *or on behalf of* the person aggrieved within *three hundred* days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to *secure from the respondent a conciliation agreement acceptable to the Commission,* the Commission *may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has notified a civil action in a*

case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved, or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the *Commission*, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action *upon certification* that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (*c*) *or* (*d*) *of this section or further* efforts of the Commission to obtain voluntary compliance.

(*2*) *Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.*

(*3*) *Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.*

(*4*) *It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the*

case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(*5*) *It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.*

(*g*) *If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).*

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101–115), shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under *this section*, the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under *this section* and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

SEC. 707. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a

complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9, of title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all

court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

EFFECT ON STATE LAWS

SEC. 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

SEC. 709. (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, *engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and* utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, *pay by advance or reimbursement* such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

(c) *Every* employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable,

594-115 O - 75 - 6

necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purpose of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and *to* furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, *and, if such application for an exemption is denied*, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. *If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.*

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

INVESTIGATORY POWERS

SEC. 710. For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of

the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply.

NOTICES TO BE POSTED

SEC. 711. (a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

VETERANS' PREFERENCE

SEC. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

RULES AND REGULATIONS

SEC. 713. (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under the section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

FORCIBLY RESISTING THE COMMISSION OR ITS REPRESENTATIVES

SEC. 714. The provisions of *sections 111 and 1114* title 18, United States Code, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. *Notwithstanding the provisions of sections 111 and 1114 of title 18, United States Code, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official*

functions under this Act shall be punished by imprisonment for any term of years or for life.

EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL

SEC. 715. There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates. The Council shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

EFFECTIVE DATE

SEC. 716. (a) This title shall become effective one year after the date of its enactment.

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c) The President shall, as soon as feasible after the enactment of this title, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this title to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this title when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this title.

NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

SEC. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of

the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department

agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

SPECIAL PROVISIONS WITH RESPECT TO DENIAL, TERMINATION, AND SUSPENSION OF GOVERNMENT CONTRACTS

SEC. 718. No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of title 5, United States Code, section 554, and the following pertinent sections: Provided, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: Provided further, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

APPENDIX B

THE CIVIL SERVICE COMMISSION'S EQUAL OPPORTUNITY REGULATIONS

PART 713—EQUAL OPPORTUNITY

SUBPART B—EQUAL OPPORTUNITY WITHOUT REGARD TO RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

Subpart B of Part 713 Equal Opportunity is revised to implement the Equal Employment Opportunity Act of 1972, 86 Stat. 103, and to strengthen the system of complaint processing. Among others, these changes emphasize the affirmative aspects of agency equal employment opportunity obligations, set out requirements for submission of national and regional plans, extend the time limits for contacting a counselor, provide for the reasonable accommodation to the religious needs of applicants and employees, provide for timely investigation and resolution of complaints including complaints of coercion and reprisal, set out the remedial action available(including back pay), and strengthen the third party complaint system.

GENERAL PROVISIONS

Sec.
713.201 Purpose and applicability.
713.202 General policy.
713.203 Agency program.
713.204 Implementation of agency program.
713.205 Commission review and evaluation of agency program operations.

AGENCY REGULATIONS FOR PROCESSING COMPLAINTS OF DISCRIMINATION

713.211 General.
713.212 Coverage.
713.213 Precomplaint processing.
713.214 Filing and presentation of complaint.
713.215 Rejection or cancellation of complaint.
713.216 Investigation.
713.217 Adjustment of complaint and offer of hearing.

Sec.
713.218 Hearing.
712.219 Relationship to other agency appellate procedures.
713.220 Avoidance of delay.
713.221 Decision by head of agency or designee.
713.222 Complaint file.

APPEAL TO THE COMMISSION

713.231 Entitlement.
713.232 Where to appeal.
713.233 Time limit.
713.234 Appellate procedures.
713.235 Review by the Commissioners.
713.236 Relationship to other appeals.

REPORTS TO THE COMMISSION

713.241 Reports to the Commission on complaints.

THIRD-PARTY ALLEGATIONS

713.251 Third-party allegations of discrimination.

FREEDOM FROM REPRISAL OR INTERFERENCE

713.261 Freedom from reprisal.
713.262 Review of allegations of reprisal.

REMEDIAL ACTIONS

713.271 Remedial actions.

RIGHT TO FILE A CIVIL ACTION

713.281 Statutory right.
713.282 Notice of right.
713.283 Effect on administrative processing.

AUTHORITY: The provisions of this Subpart B issued under 5 U.S.C. 1301, 3301, 3302, 7151–7154, 7301; 86 Stat. 111; E.O. 10577; 3 CFR, 1954–58 Comp., p. 218, E.O. 11222, 3 CFR 1964–1965 Comp., p. 306, E.O. 11478, 3 CFR 1969 Comp.

SUBPART B—EQUAL OPPORTUNITY WITHOUT REGARD TO RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

General Provisions

§ 713.201 PURPOSE AND APPLICABILITY

(a) Purpose. This subpart sets forth the regulations under which an agency shall establish a continuing affirmative program for equal opportunity in employment and personnel operations without regard to race, color, religion, sex, or national origin and under which the Commission will review an agency's program and entertain an appeal from a person dissatisfied with an agency's decision or other final action on his complaint of discrimination on grounds of race, color, religion, sex, or national origin.

(b) Applicability. (1) This subpart applies: (i) To military department as defined in section 102 of title 5, United States Code, executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, the U.S. Postal Service, and the Postal Rate Commission, and to the employees thereof, including employees paid from nonappropriated funds, and (ii) to those portions of the legislative and judicial branches of the Federal Government and the government of the District of Columbia having positions in the competitive service and to the employees in those positions.

(2) This subpart does not apply to aliens employed outside the limits of the United States.

§ 713.202 GENERAL POLICY

It is the policy of the Government of the United States and of the government of the District of Columbia to provide equal opportunity in employment for all persons, to pro-

hibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

§ 713.203 AGENCY PROGRAM

The head of each agency shall exercise personal leadership in establishing, maintaining, and carrying out a continuing affirmative program designed to promote equal opportunity in every aspect of agency personnel policy and practice in the employment, development, advancement, and treatment of employees. Under the terms of its program, an agency shall:

(a) Provide sufficient resources to administer its equal employment opportunity program in a positive and effective manner and assure that the principal and operating officials responsible for carrying out the equal employment opportunity program meet established qualifications requirements;

(b) Conduct a continuing campaign to eradicate every form of prejudice or discrimination based upon race, color, religion, sex, or national origin, from the agency's personnel policies and practices and working conditions, including disciplinary action against employees who engage in discriminatory practices;

(c) Utilize to the fullest extent the present skills of employee by all means, including the redesigning of jobs where feasible so that tasks not requiring the full utilization of skills of incumbents are concentrated in jobs with lower skill requirements;

(d) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs, and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;

(e) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, or national origin, and solicit their recruitment assistance on a continuing basis;

(f) Participate at the community level with other employers, with schools and universities, and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability;

(g) Review, evaluate, and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training, and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;

(h) Provide recognition to employees, supervisors, managers, and units demonstrating superior acomplishment in equal employment opportunity;

(i) Inform its employees and recognized labor organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation;

(j) Provide for counseling employees and applicants who believe they have been discriminated against because of race, color, religion, sex, or national origin and for resolving informally the matters raised by them;

(k) Provide for the prompt, fair, and impartial consideration and disposition of complaints involving issues of discrimination on grounds of race, color, religion, sex, or national origin; and

(l) Establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort.

§ 713.204 IMPLEMENTATION OF AGENCY PROGRAM

To implement the program established under this subpart, an agency shall:

(a) Develop the plans, procedures, and regulations necessary to carry out its program established under this subpart;

(b) Appraise its personnel operations at regular intervals to assure their conformity with the policy in § 713.202 and its program established in accordance with § 713.203;

(c) Designate a Director of Equal Employment Opportunity and as many Equal Opportunity Officers, Equal Employment Opportunity Counselors, Federal Women's Program Coordinators, and other persons as may be necessary, to assist the head of the agency to carry out the functions described in this subpart in all organizational units and locations of the agency. The functioning and the qualifications of the persons so designated shall be subject to review by the Commission. The Director of Equal Employment Opportunity shall be under the immediate supervision of the head of his agency, and shall be given the authority necessary to enable him to carry out his responsibilities under the regulations in this subpart;

(d) Assign to the Director of Equal Employment Opportunity the functions of;

(1) Advising the head of his agency with respect to the preparation of national and regional equal employment opportunity plans, procedures, regulations, reports, and other matters pertaining to the policy in § 713.202 and the agency program required to be established under § 713.203;

(2) Evaluating from time to time the sufficiency of the total agency program for equal employment opportunity and reporting thereon to the head of the agency with recommendations as to any improvement or correction needed, including remedial or

disciplinary action with respect to managerial or supervisory employees who have failed in their responsibilities;

(3) When authorized by the head of the agency, making changes in programs and procedures designed to eliminate discriminatory practices and improve the agency's program for equal employment opportunity;

(4) Providing for counseling by an Equal Employment Opportunity Counselor, of any aggrieved employee or applicant for employment who believes that he has been discriminated against because of race, color, religion, sex, or national origin and for attempting to resolve on an informal basis the matter raised by the employee or applicant before a complaint of discrimination may be filed under § 713.214;

(5) Providing for the receipt and investigation of individual complaints of discrimination in personnel matters within the agency, subject to §§ 713.211 through 713.222;

(6) Providing for the receipt, investigation, and disposition of general allegations by organizations or other third parties of discrimination in personnel matters within the agency subject to § 713.251.

(7) When authorized by the head of the agency, making the decision under § 713.221 for the head of the agency on complaints of discrimination and ordering such corrective measures as he may consider necessary, including the recommendation for such disciplinary action as is warranted by the circumstances when an employee has been found to have engaged in a discriminatory practice; and

(8) When not authorized to make the decision for the head of the agency on complaints of discrimination, reviewing at his

594-115 O - 75 - 7

discretion, the record on any complaint before the decision is made under § 713.221 and making such recommendations to the head of the agency or his designee as he considers desirable, including the recommendation for such disciplinary action as is warranted by the circumstances when an employee is found to have engaged in a discriminatory practice;

(e) Insure that equal opportunity for women is an integral part of the agency's overall program by assigning to the Federal Women's Program Coordinators the function of advising the Director of Equal Employment Opportunity on matters affecting the employment and advancement of women;

(f) Publicize to its employees and post permanently on official bulletin boards:

(1) The names and addresses of the Director of Equal Employment Opportunity and the Federal Women's Program Coordinators;

(2) The name and address of the appropriate Equal Employment Opportunity Officer;

(3) The name and address of the Equal Employment Opportunity Counselor and the organizational units he serves; his availability to counsel an employee or applicant for employment who believes that he has been discriminated against because of race, color, religion, sex, or national origin; and the requirement that an employee or applicant for employment must consult the Counselor as provided by § 713.213 about his allegation of discrimination because of race, color, religion, sex, or national origin before a complaint as provided by § 713.214 may be filed; and

(4) Time limits for contacting an Equal Employment Opportunity Counselor.

(g) Make reasonable accommodations to the religious needs of applicants and employees, including the needs of those who observe the Sabbath on other than Sunday, when those accommodations can be made (by substitution of another qualified employee, by a grant of leave, a change of a tour of duty, or other means) without undue hardship on the business of the agency. If an agency cannot accommodate an employee or applicant, it has a duty in a complaint arising under this subpart to demonstrate its inability to do so; and

(h) Make readily available to its employees a copy of its regulations issued to carry out its program of equal employment opportunity.

(i) Submit annually for the review and approval of the Commission written national and regional equal employment opportunity plans of action. Plans shall be submitted in a format prescribed by the Commission and shall include, but not be limited to—

(1) Provision for the establishment of training and education programs designed to provide maximum opportunity for employees to advance so as to perform at their highest potential;

(2) Description of the qualifications, in terms of training and experience relating to equal employment opportunity, of the principal and operating officials concerned with administration of the agency's equal employment opportunity program; and

(3) Description of the allocation of personnel and resources proposed by the agency to carry out its equal employment opportunity program.

§ 713.205 COMMISSION REVIEW AND EVALUATION OF AGENCY PROGRAM OPERATIONS

The Commission shall review and evaluate agency program operations periodically, obtain

such reports as it deems necessary, and report to the President as appropriate on overall progress. When it finds that an agency's program operations are not in conformity with the policy set forth in § 713.202 and the regulations in this subpart, the Commission shall require improvement or corrective action to bring the agency's program operations into conformity with this policy and the regulations in this subpart. The head of each department and agency shall comply with the rules, regulations, orders, and instructions issued by the Commission.

Agency Regulations for Processing Complaints of Discrimination

§ 713.211 GENERAL

An agency shall insure that its regulations governing the processing of complaints of discrimination on grounds of race, color, religion, sex, or national origin comply with the principles and requirements in §§ 713.212 through 713.222.

§ 713.212 COVERAGE

(a) The agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment with that agency who believes that he has been discriminated against because of race, color, religion, sex, or national origin. A complaint may also be filed by an organization for the aggrieved person with his consent

(b) Sections 713.211 through 713.222 do not apply to the consideration by an agency of a general allegation of discrimination by an organization or other third party which is unrelated to an individual complaint of discrimination subject to §§ 713.211 through 713.222. (Section 713.251 applies to general allegations by organizations or other third parties.)

§ 713.213 PRECOMPLAINT PROCESSING

(a) An agency shall require that an aggrieved person who believes that he has been discriminated against because of race, color, religion, sex, or national origin consult with an Equal Employment Opportunity Counselor when he wishes to resolve the matter. The agency shall require the Equal Employment Opportunity Counselor to make whatever inquiry he believes necessary into the matter; to seek a solution of the matter on an informal basis; to counsel the aggrieved person concerning the issues in the matter; to keep a record of his counseling activities so as to brief periodically, the Equal Employment Opportunity Officer on those activities; and, when advised that a complaint of discrimination has been accepted from an aggrieved person, to submit a written report to the Equal Employment Opportunity Officer, with a copy to the aggrieved person, summarizing his actions and advice both to the agency and the aggrieved person concerning the issues in the matter. The Equal Employment Opportunity Counselor shall, insofar as is practicable, conduct his final interview with the aggrieved person not later than 21 calendar days after the date on which the matter was called to his attention by the aggrieved person. If the final interview is not concluded within 21 days and the matter has not previously been resolved to the satisfaction of the aggrieved person, shall be informed in writing at that time of his right to file a complaint of discrimination. The notice shall inform the complainant of his right to file a complaint at any time after receipt of the notice up to 15 calendar days after the final interview (which shall be so identified in writing by the Equal Employment Opportunity Counselor) and the appropriate official with whom to file a complaint. The Counselor shall not attempt in any way to re-

strain the aggrieved person from filing a formal complaint. The Equal Employment Opportunity Counselor shall not reveal the identity of an aggrieved person who has come to him for consultation, except when authorized to do so by the aggrieved person, until the agency has accepted a complaint of discrimination from him.

(b) The agency shall assure that full cooperation is provided by all employees to the Equal Employment Opportunity Counselor in the performance of his duties under this section.

(c) The Equal Employment Opportunity Counselor shall be free from restraint, interference, coercion, discrimination, or reprisal in connection with the peformance of his duties under this section.

§ 733.214 FILING AND PRESENTATION OF COMPLAINT

(a) Time limits. (1) An agency shall require that a complaint be submitted in writing by the complainant or his representative and be signed by the complainant. The complaint may be delivered in person or submitted by mail. The agency may accept the complaint for processing in accordance with this subpart only if—

(i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him to believe he had been discriminated against within 30 calendar days of the date of that matter, or, if a personnel action, within 30 calendar days of its effective date; and

(ii) The complainant or his representative submitted his written complaint to an appropriate official within 15 calendar days of the date of his final interview with the Equal Employment Opportunity Counselor.

(2) The appropriate officials to receive complaints are the head of the agency, the agency's Director of Equal Employment Opportunity, the head of a field installation, an Equal Employment Opportunity Officer, a Federal Women's Program Coordinator, and such other officials as the agency may designate for that purpose. Upon receipt of the complaint, the agency official shall transmit it to the Director of Equal Employment Opportunity or appropriate Equal Employment Opportunity Officer who shall acknowledge its receipt in accordance with subparagraph (3) of this paragraph.

(3) A complaint shall be deemed filed on the date it is received, if delivered to an appropriate official, or on the date postmarked if addressed to an appropriate official designated to receive complaints. The agency shall acknowledge to the complainant or his representative in writing receipt of the complaint and advise the complaintant in writing of all his administrative rights and of his right to file a civil action as set forth in § 713.281, including the time limits imposed on the exercise of these rights.

(4) The agency shall extend the time limits in this section: (i) When the complainant shows that he was not notified of the time limits and was not otherwise aware of them, or that he was prevented by circumstances beyond his control from submitting the matter within the time limits; or (ii) for other reasons considered sufficient by the agency.

(b) Presentation of complaint. At any stage in the presentation of a complaint, including the counseling stage under § 713.213, the complainant shall have the right to be accompanied, represented, and advised by a representative of his own choosing. If the complainant is an employee of the agency, he shall have a reasonable amount of official time to present his complaint if he is otherwise in an active duty status. If the complainant is an employee of the agency

and ne designates another employee of the agency as his representative, the representative, shall have a reasonable amount of official time, if he is otherwise in an active duty status, to present the complaint.

§ 713.215 REJECTION OR CANCELLATION OF COMPLAINT

The head of the agency or his designee may reject a complaint which was not timely filed and shall reject those allegations in a complaint which are not within the purview of § 713.212 or which set forth identical matters as contained in a previous complaint filed by the same complainant which is pending in the agency or has been decided by the agency. He may cancel a complaint because of failure of the complainant to prosecute the complaint. He shall transmit the decision to reject or cancel by letter to the complainant and his representative. The decision letter shall inform the complainant of his right to appeal the decision of the agency to the Commission and of the time limit within which the appeal may be submitted and of his right to file a civil action as described in § 713.281.

§ 713.216 INVESTIGATION

(a) The Equal Employment Opportunity Officer shall advise the Director of Equal Employment Opportunity of the acceptance of a complaint. The Director of Equal Employment Opportunity shall provide for the prompt investigation of the complaint. The person assigned to investigate the complaint shall occupy a position in the agency which is not, directly or indirectly, under the jurisdiction of the head of that part of the agency in which the complaint arose. The agency shall authorize the investigator to administer oaths and require that statements of witnesses shall be under

oath or affirmation, without a pledge of confidence. The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the complainant. Information needed for an appraisal of the utilization of members of the complainant's group as compared to the utilization of persons outside the complainant's group shall be recorded in statistical form in the investigative file, but specific information as to a person's membership or nonmembership in the complainant's group needed to facilitate an adjustment of the complaint or to make an informed decision on the complaint shall, if available, be recorded by name in the investigative file. (As used in this subpart, the term "investigative file" shall mean the various documents and information acquired during the investigation under this section—including affidavits of the complainant, of the alleged discriminating official, and of the witnesses and copies of, or extracts from, records, policy statements, or regulations of the agency—organized to show their relevance to the complaint or the general environment out of which the complaint arose.) If necessary, the investigator may obtain information regarding the membership or nonmembership of a person in the complainant's group by asking each person concerned to provide the information voluntarily; he shall not require or coerce an employee to provide this information.

(b) The Director of Equal Employment Opportunity shall arrange to furnish to the

person conducting the investigation a written authorization: (1) To investigate all aspects of complaints of discrimination, (2) to require all employees of the agency to cooperate with him in the conduct of the investigation, and (3) to require employees of the agency having any knowledge of the matter complained of to furnish testimony under oath or affirmation without a pledge of confidence.

§ 713.217 ADJUSTMENT OF COMPLAINT AND OFFER OF HEARING

(a) The agency shall provide an opportunity for adjustment of the complaint on an informal basis after the complainant has reviewed the investigative file. For this purpose, the agency shall furnish the complainant a copy of the investigative file promptly after receiving it from the investigator, and provide opportunity for the complainant to discuss the investigative file with appropriate officials. If an adjustment of the complaint is arrived at, the terms of the adjustment shall be reduced to writing and made part of the complaint file, with a copy of the terms of the adjustment provided the complainant. If the agency does not carry out, or rescinds, any action specified by the terms of the adjustment for any reason not attributable to acts or conduct of the complainant the agency shall, upon the complainant's written request, reinstate the complaint for further processing from the point processing ceased under the terms of the adjustment.

(b) If an adjustment of the complaint is not arrived at, the complainant shall be notified in writing: (1) Of the proposed disposition of complaint, (2) of his right to a hearing and decision by the agency head or his designee if he notifies the agency in writing within 15 calendar days of the receipt of the notice that he desires a hearing, and (3) of his right to a

decision by the head of the agency or his designee without a hearing.

(c) If the complainant fails to notify the agency of his wishes within the 15-day period prescribed in paragraph (b) of this section, the appropriate Equal Employment Opportunity Officer may adopt the disposition of the complaint proposed in the notice sent to the complainant under paragraph (b) of this section as the decision of the agency on the complaint when delegated the authority to make a decision for the head of the agency under those circumstances. When this is done, the Equal Employment Opportunity Officer shall transmit the decision by letter to the complainant and his representative which shall inform the complainant of his right of appeal to the Commission and the time limit applicable thereto and of his right to file a civil action as described in § 713.231. If the Equal Employment Opportunity Officer does not issue a decision under this paragraph, the complainant, together with the complaint file shall be forwarded to the head of the agency, or his designee, for decision under § 713.221.

§ 713.218 HEARING.

(a) Complaints examiner. The hearing shall be held by a complaints examiner who must be an employee of another agency except when the agency in which the complaint arose is: (1) The government of the District of Columbia, or (2) an agency which, by reason of law, is prevented from divulging information concerning the matter complained of to a person who has not received the security clearance required by that agency, in which event the agency shall arrange with the Commission for the selection of an impartial employee of the agency to serve as complaints examiner. (For purposes of this paragraph, the Department of Defense

is considered to be a single agency.) The agency in which the complaint arose shall request the Commission to supply the name of a complaints examiner who has been certified by the Commission as qualified to conduct a hearing under this section.

(b) Arrangements for hearing. The agency in which the complaint arose shall transmit the complaint file containing all the documents described in § 713.222 which have been acquired up to that point in the processing of the complaint, including the original copy of the investigative file (which shall be considered by the complaints examiner in making his recommended decision on the complaint), to the complaints examiner who shall review the complaint file to determine whether further investigation is needed before scheduling the hearing. When the complaints examiner determines that further investigation is needed, he shall remand the complaint to the Director of Equal Employment Opportunity for further investigation or arrange for the appearance of witnesses necessary to supply the needed information at the hearing. The requirements of § 713.216 apply to any further investigation by the agency on the complaint. The complaints examiner shall schedule the hearing for a convenient time and place.

(c) Conduct of hearing. (1) Attendance at the hearing is limited to persons determined by the complaints examiner to have a direct connection with the complaint.

(2) The complaints examiner shall conduct the hearing so as to bring out pertinent facts, including the production of pertinent documents. Rules of evidence shall not be applied strictly, but the complaints examiner shall exclude irrelevant or unduly repetitious evidence. Information having a bearing on the complaint or employment policy or practices relevant to the complaint shall be received in evidence. The complainant, his representative, and the

representatives of the agency at the hearing shall be given the opportunity to cross-examine witnesses who appear and testify. Testimony shall be under oath or affirmation.

(d) Powers of complaints examiner. In addition to the other powers vested in the complaints examiner by the agency in accordance with this subpart, the agency shall authorize the complaints examiner to:

(1) Administer oaths or affirmations;
(2) Regulate the course of the hearing;
(3) Rule on offers of proof;
(4) Limit the number of witnesses whose testimony would be unduly repetitious; and
(5) Exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

(e) Witnesses at hearing. The complaints examiner shall request any agency subject to this subpart to make available as a witness at the hearing an employee requested by the complainant when he determines that the testimony of the employee is necessary. He may also request the appearance of an employee of any Federal agency whose testimony he determines is necessary to furnish information pertinent to the complaint under consideration. The complaints examiner shall give the complainant his reasons for the denial of a request for the appearance of employees as witnesses and shall insert those reasons in the record of the hearing. An agency to whom a request is made shall make its employees available as witnesses at a hearing on a complaint when requested to do so by the complaints examiner and it is not administratively impracticable to comply with the request. When it is administratively impracticable to comply with the request for a witness, the agency to whom request is made shall provide an explanation to the complaints examiner. If the explanation is inadequate, the

complaints examiner shall so advise the agency and request it to make the employee available as a witness at the hearing. If the explanation is adequate, the complaints examiner shall insert it in the record of the hearing, provide a copy to the complainant, and make arrangements to secure testimony from the employee through a written interrogatory. An employee of an agency shall be in a duty status during the time he is made available as a witness.

(f) Record of hearing. The hearing shall be recorded and transcribed verbatim. All documents submitted to, and accepted by, the complaints examiner at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, he shall make the document available to the agency representative for reproduction.

(g) Findings, analysis, and recommendations. The complaints examiner shall transmit to the head of the agency or his designee: (1) The complaint file (including the record of the hearing), (2) the findings and analysis of the complaints examiner with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose, and (3) the recommended decision of the complaints examiner on the merits of the complaint, including recommended remedial action, where appropriate, with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose. The complaints examiner shall notify the complainant of the date on which this was done. In addition, the complaints examiner shall transmit, by separate letter to the Director of Equal Employment Opportunity, whatever findings and recommendations he considers appropriate with respect to conditions in the agency which do not bear directly on the matter which gave rise to the complaint or which bear on the general environment out of which the complaint arose.

§ 713.219 RELATIONSHIP TO OTHER AGENCY APPELLATE PROCEDURES

(a) Except as provided in paragraphs (b) and (c) of this section, when an employee makes a written allegation of discrimination on grounds of race, color, religion, sex, or national origin, in connection with an action that would otherwise be processed under a grievance or appeals system of the agency, the agency may process the allegation of discrimination under that system when the system meets the principles and requirements in §§ 713.212 through 713.220 and the head of the agency, or his designee, makes the decision of the agency on the issue of discrimination. That decision on the issue of discrimination shall be incorporated in and become a part of the decision on the grievance or appeal.

(b) An allegation of discrimination made in connection with an appeal under Subpart B of Part 771 of this chapter shall be processed under that subpart.

(c) An allegation of discrimination made in connection with a grievance under Subpart C of Part 771 of this chapter shall be processed under this part.

§ 713.220 AVOIDANCE OF DELAY

(a) The complaint shall be resolved promptly. To this end, both the complainant and the agency shall proceed with the complaint without undue delay so that the complaint is resolved within 180 calendar days after it was filed, including time spent in the processing of the complaint by the complaints examiner under § 713.218.

(b) The head of the agency or his designee may cancel a complaint if the complainant fails to prosecute the complaint without undue delay. However, instead of canceling for failure to prosecute, the complaint may be adjudicated if sufficient information for that purpose is available.

(c) The agency shall furnish the Commission monthly reports on all complaints pending within the agency in a form specified by the Commission. If an agency has not issued a final decision, and has not requested the Commission to supply a complaints examiner, within 75 calendar days from the date a complaint was filed, the Commission may require the agency to take special measures to insure prompt processing of the complaint or may assume responsibility for processing the complaint, including supplying an investigator to conduct any necessary investigation on behalf of the agency. When the Commission supplies an investigator, the agency shall reimburse the Commission for all expenses incurred in connection with the investigation and shall notify the complainant in writing of the proposed disposition of the complaint no later than 15 calendar days after its receipt of the investigative report.

(d) When the complaints examiner has submitted a recommended decision finding discrimination and the agency has not issued a final decision within 180 calendar days after the date the complaint was filed, the complaints examiner's recommended decision shall become a final decision binding on the agency 30 calendar days after its submission to the agency. In such event, the agency shall so notify the complainant of the decision and furnish to him a copy of the findings, analysis, and recommended decision of the complaints examiner under § 713.218(g) and a copy of the hearing record and also shall notify him in writing of his right

of appeal to the Commission and the time limits applicable thereto and of his right to file a civil action as described in § 713.281.

§ 713.221 DECISION BY HEAD OF AGENCY OR DESIGNEE

(a) The head of the agency, or his designee, shall make the decision of the agency on a complaint based on information in the complaint file. A person designated to make the decision for the head of the agency shall be one who is fair, impartial, and objective.

(b)(1) The decision of the agency shall be in writing and shall be transmitted by letter to the complainant and his representative. When there has been no hearing, the decision shall contain the specific reasons in detail for the agency's action, including any remedial action taken.

(2) When there has been a hearing on the complaint, the decision letter shall transmit a copy of the findings, analysis, and recommended decision of the complaints examiner under section 713.218(g) and a copy of the hearing record. The decision of the agency shall adopt, reject, or modify the decision recommended by the complaints examiner. If the decision is to reject or modify the recommended decision, the decision letter shall set forth the specific reasons in detail for rejection or modification.

(3) When there has been no hearing and no decision under § 713.217(c), the decision letter shall set forth the findings, analysis, and decision of the head of the agency or his designee.

(c) The decision of the agency shall require any remedial action authorized by law determined to be necessary or desirable to resolve the issues of discrimination and to promote the policy of equal opportunity, whether or not there is a finding of discrimination. When discrimination is found, the agency shall require

594-115 O - 75 - 6

remedial action to be taken in accordance with § 713.271, shall review the matter giving rise to the complaint to determine whether disciplinary action against alleged discriminatory officials is appropriate, and shall record the basis for its decision to take, or not to take, disciplinary action but this decision shall not be included in the complaint file.

(d) The decision letter shall inform the complainant of his right to appeal the decision of the agency to the Commission of his right to file a civil action in accordance with § 713.281, and of the time limits applicable thereto.

§ 713.222 COMPLAINT FILE

The agency shall establish a complaint file. Except as provided in § 713.221(c), this file shall contain all documents pertinent to the complaint. The complaint file shall include copies of: (a) The notice of the Equal Employment Opportunity Counselor to the aggrieved person under § 713.213(a), (b) the written report of the Equal Employment Opportunity Counsel under § 713.213 to the Equal Employment Opportunity Officer on whatever precomplaint counseling efforts were made with regard to the complainant's case, (c) the complaint, (d) the investigative file, (e) if the complaint is withdrawn by the complainant, a written statement of the complainant or his representative to that effect, (f) if adjustment of the complaint is arrived at under § 713.217, the written record of the terms of the adjustment, (g) if no adjustment of the complaint is arrived at under § 713.217, a copy of the letter notifying the complainant of the proposed disposition of the complaint and of his right to a hearing, (h) if decision is made under §713.217(c), a copy of the letter to the complainant transmitting that decision, (i) if a hearing was held, the record of the hearing, together with the complaints ex-

aminer's findings, analysis, and recommended decision on the merits of the complaint, (j) if the Director of Equal Employment Opportunity is not the designee, the recommendations, if any, made by him to the head of the agency or his designee, and (k) if decision is made under § 713.221, a copy of the letter transmitting the decision of the head of the agency or his designee. The complaint file shall not contain any document that has not been made available to the complainant or to his designated physician under § 294.401 of this chapter.

APPEAL TO THE COMMISSION

§ 713.231 ENTITLEMENT

(a) Except as provided by paragraph (b) of this section, a complainant may appeal to the Commission the decision of the head of the agency, or his designee:

(1) To reject his complaint, or a portion thereof, for reasons covered by § 713.215; or

(2) To cancel his complaint because of the complainant's failure to prosecute his complaint; or

(3) On the merits of the complaint, under § 713.217(c) or § 713.221, but the decision does not resolve the complaint to the complainant's satisfaction.

(b) A complainant may not appeal to the Commission under paragraph (a) of this section when the issue of discrimination giving rise to the complaint is being considered, or has been considered, in connection with any other appeal by the complainant to the Commission.

§ 713.232 WHERE TO APPEAL

The complainant shall file his appeal in writing, either personally or by mail, with the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D.C. 20415.

§ 713.233 TIME LIMIT

(a) Except as provided in paragraph (b) of this section, a complainant may file an appeal at any time after receipt of his agency's notice of final decision on his complaint but not later than 15 calendar days after receipt of that notice.

(b) The time limit in paragraph (a) of this section may be extended in the discretion of the Board of Appeals and Review, upon a showing by the complainant that he was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his control prevented him from filing an appeal within the prescribed time limit.

§ 713.234 APPELLATE PROCEDURES

The Board of Appeals and Review shall review the complaint file and all relevant written representations made to the board. The board may remand a complaint to the agency for further investigation or a rehearing if it considers that action necessary or have additional investigation conducted by Commission personnel. This subpart applies to any further investigation or rehearing resulting from a remand from the board. There is no right to a hearing before the board. The board shall issue a written decision setting forth its reasons for the decision and shall send copies thereof the complainant, his designated representative, and the agency. When corrective action is ordered, the agency shall report promptly to the board that the corrective action has been taken. The decision of the board is final, but shall contain a notice of the right to file a civil action in accordance with § 713.282.

§ 713.235 REVIEW BY THE COMMISSIONERS

The Commissioners may, in their discretion, reopen and reconsider any previous decision

when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) New and material evidence is available that was not readily available when the previous decision was issued;

(2) The previous decision involves an erroneous interpretation of law or regulation or a misapplication of established policy; or

(3) The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand, or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

§ 713.236 RELATIONSHIP TO OTHER APPEALS

When the basis of the complaint of discrimination because of race, color, religion, sex, or national origin involves an action which is otherwise appealable to the Commission and the complainant having been informed by the agency of his right to proceed under this subpart elects to proceed by appeal to the Commission, the case, including the issue of discrimination, will be processed under the regulations appropriate to that appeal when the complainant makes a timely appeal to the Commission in accordance with those regulations.

REPORTS TO THE COMMISSION

§ 713.241 REPORTS TO THE COMMISSION ON COMPLAINTS

Each agency shall report to the Commission information concerning precomplaint counseling and the status and disposition of complaints under this subpart at such times and in such manner as the Commission prescribes.

THIRD PARTY ALLEGATIONS

§ 713.251 THIRD-PARTY ALLEGATION OF DISCRIMINATION

(a) Coverage. This section applies to general allegations by organizations or other third parties of discrimination in personnel matters within the agency which are unrelated to an individual complaint of discrimination subject to §§ 713.211 through 713.222.

(b) Agency procedure. The organization or other third party shall state the allegation with sufficient specificity so that the agency may investigate the allegation. The agency may require additional specificity as necessary to proceed with its investigation. The agency shall establish a file on each general allegation, and this file shall contain copies of all material used in making the decision on the allegation. The agency shall furnish a copy of this file to the party submitting the allegation and shall make it available to the Commission for review on request. The agency shall notify the party submitting the allegation of its decision, including any corrective action taken on the general allegations, and shall furnish to the Commission on request a copy of its decision.

(c) Commission procedures. If the third party disagrees with the agency decision, it may, within 30 days after receipt of the decision, request the Commission to review it. The request shall be in writing and shall set forth with particularity the basis for the request. When the Commission receives such a request, it shall make, or require the agency to make, any additional investigations the Commission deems necessary. The Commission shall issue a decision on the allegation ordering such corrective action, with or without back pay, as it deems appropriate.

FREEDOM FROM REPRISAL OR INTERFERENCES

§ 713.261 FREEDOM FROM REPRISAL

(a) Complainants, their representatives, and witnesses shall be free from restraint interference, coercion, discrimination, or reprisal at any stage in the presentation and processing of a complaint, including the counseling stage under section 713, or any time thereafter.

§ 713.262 REVIEW OF ALLEGATIONS OF REPRISAL

(a) Choice of review procedures. A complainant, his representative, or a witness who alleges restraint, interference, coercion, discrimination, or reprisal in connection with the presentation of a complaint under this subpart, may, if an employee or applicant, have the allegation reviewed as an individual complaint of discrimination subject to §§ 713.211 through 713.222 or as a charge subject to paragraph (b) of this section.

(b) Procedure for review of charges. (1) An employee or applicant may file a charge of restraint, interference, coercion, discrimination or reprisal, in connection with the presentation of a complaint with an appropriate agency official as defined in § 713.214(a)(2) within 15 calendar days of the date of the alleged occurrence. The charge shall be in writing and shall contain all pertinent facts. Except as provided in subparagraph (2) of this paragraph, the agency shall undertake an appropriate inquiry into such a charge and shall forward to the Commission within 15 calendar days of the date of its receipt a copy of the charge and report of action taken. The agency shall also provide the charging party with a copy of the report of action taken. When the agency has not completed an appropriate inquiry 15 calendar days after receipt of such a charge, the

charging party may submit a written statement with all pertinent facts to the Commission, and the Commission shall require the agency to take whatever action is appropriate.

(c) When a complainant, after completion of the investigation of his complaint under § 713.216, requests a hearing and in connection with that complaint alleges restraint, interference, coercion, discrimination, or reprisal, the complaints examiner assigned to hold the hearing shall consider the allegation as an issue in the complaint at hand or refer the matter to the agency for further processing under the procedure chosen by the complainant pursuant to paragraph (a) of this section.

Remedial Actions

§ 713.271 REMEDIAL ACTIONS

(a) Remedial action involving an applicant. (1) When an agency, or the Commission, finds that an applicant for employment has been discriminated against and except for that discrimination would have been hired, the agency shall offer the applicant employment of the type and grade denied him. The offer shall be made in writing. The individual shall have 15 calendar days from receipt of the offer within which to accept or decline the offer. Failure to notify the agency of his decision within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his control prevented him from responding within the time limit. If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired, subject to the limitation in subparagraph (4) of this paragraph. Backpay, computed in the same manner prescribed by § 550.804 of this chapter, shall be awarded from the beginning of the retroactive period, subject to the same limitation, until the date the individual actually enters on duty. The individual shall be deemed to have performed service for the agency during this period of retroactivity for all purposes except for meeting service requirements for completion of a probationary or trial period that is required. If the offer is declined, the agency shall award the individual a sum equal to the backpay he would have received, computed in the same manner prescribed by § 550.804 of this chapter, from the date he would have been appointed until the date the offer was made, subject to the limitation of subparagraph (4) of this paragraph. The agency shall inform the applicant, in its offer, of his right to this award in the event he declines the offer.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but does not find that the individual is the one who would have been hired except for discrimination, the agency shall consider the individual for any existing vacancy of the type and grade for which he had been considered initially and for which he is qualified before consideration is given to other candidates. If the individual is not selected, the agency shall record the reasons for nonselection. If no vacancy exists, the agency shall give him this priority consideration for the next vacancy for which he is qualified. This priority shall take precedence over priorities provided under other regulations in this chapter.

(3) This paragraph shall be cited as the authority under which the above-described appointments or awards of backpay shall be made.

(4) A period of retroactivity or a period for which backpay is awarded under this paragraph may not extend from a date earlier than 2 years prior to the date on which the complaint was initially filed by the applicant. If a finding of discrimination was not based on a complaint, the period of retroactivity or period for which

backpay is awarded this paragraph may not extend earlier than 2 years prior to the date the finding of discrimination was recorded.

(b) Remedial action involving an employee. When an agency, or the Commission, finds that an employee of the agency was discriminated against and as a result of that discrimination was denied an employment benefit, or an administrative decision adverse to him was made, the agency shall take remedial actions which shall include one or more of the following, but need not be limited to these actions:

(1) Retroactive promotion, with backpay computed in the same manner prescribed by § 550.804 of this chapter, when the record clearly shows that but for the discrimination the employee would have been promoted or would have been employed at a higher grade, except that the backpay liability may not accrue from a date earlier than 2 years prior to the date the discrimination complaint was filed, but, in any event, not to exceed the date he would have been promoted. If a finding of discrimination was not based on a complaint, the backpay liability may not accrue from a date earlier than 2 years prior to the date the finding of discrimination was recorded, but, in any event, not to exceed the date he would have been promoted.

(2) Consideration for promotion to a position for which he is qualified before consideration is given to other candidates when the record shows that discrimination existed at the time selection for promotion was made but it is not clear that except for the discrimination the employee would have been promoted. If the individual is not selected, the agency shall record the reasons for nonselection. This priority consideration shall take precedence over priorities under other regulations in this chapter.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any reference to or any record of an unwarranted disciplinary action that is not a personnel action.

(5) Full opportunity to participate in the employee benefit denied him (e.g., training, preferential work assignments, overtime scheduling).

Right To File a Civil Action

§ 713.281 STATUTORY RIGHT

An employee or applicant is authorized by section 717(c) of the Civil Rights Act, as amended, 84 Stat. 112, to file a civil action in an appropriate U.S. District Court within:

(a) Thirty (30) calendar days of his receipt of notice of final action taken by his agency on a complaint.

(b) One hundred-eighty (180) calendar days from the date of filing a complaint with his agency if there has been no decision.

(c) Thirty (30) calendar days of his receipt of notice of final action taken by the Commission on his complaint, or,

(d) One hundred-eighty (180) calendar days from the date of filing an appeal with the Commission if there has been no Commission decision.

§ 713.282 NOTICE OF RIGHT

An agency shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any final action on a complaint under §§ 713.215 and 713.217, or § 713.221. The Commission shall notify an employee or applicant of his right to file a civil

action, and of the 30-day time limit for filing, in any decision under § 713.234.

§ 713.283 EFFECT ON ADMINISTRATIVE PROCESSING

The filing of a civil action by an employee or applicant does not terminate agency processing of a complaint or Commission processing of an appeal under this subpart.

UNITED STATES CIVIL SERVICE COMMISSION,
[SEAL] JAMES C. SPRY,
Executive Assistant to the Commissioners.

[FR Doc. 72-18054 Filed 10-20-72; 8:49 am]

APPENDIX C

APPEALS REVIEW BOARD DISPOSITION OF EEO APPEALS

	FY 1973	FY 1974	FY 1975
TOTAL APPEALS CLOSED 1/	677	727	749
AFFIRMED AGENCY DECISION	608	595	564
Agency found no discrimination	454	427	371
Agency found no discrimination (but further corrective action recommended by ARB)	11	12	34
Agency found discrimination	3	4	4
Agency found discrimination (further corrective action recommended by ARB)	9	4	11
Agency found complaint untimely or not within purview of regulations	131	148	144
REVERSED AGENCY DECISION	44	50	74
Agency found no discrimination	11	18	16
Agency found complaint untimely or not within purview of regulations	21	23	23
Improper rejection or cancellation of complaint	7	2	32
Failure to follow proper procedures	5	7	3
REMANDED TO AGENCY FOR FURTHER INVESTIGATION OR REHEARING	25	82	111

1/ Excludes appeals cancelled by complainant before decision or rejected by Board as untimely.

* U.S. GOVERNMENT PRINTING OFFICE : 1975 O - 594-115

Supreme Court, U. S.
FILED
FEB 25 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-768

CLARENCE BROWN,

Petitioner,

v.

GENERAL SERVICES ADMINISTRATION, *et al.*

REPLY BRIEF

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
MELVYN R. LEVENTHAL
BARRY L. GOLDSTEIN
BILL LANN LEE
ERIC SCHNAPPER
10 Columbus Circle
New York, New York 10019

JEFF GREENUP
200 West 135th Street
New York, New York 10030

Counsel for Petitioner

INDEX

PAGE

ARGUMENT 1

I. Section 717 Did Not Repeal Pre-Existing Statutory Remedies 1

II. Petitioner Should Not Be Required to Further Exhaust Administrative Remedies 9

III. Section 717 Requires a Trial *De Novo* 17

IV. The Inadequacy of the Administrative Procedure 22

CONCLUSION 26

Appendix A 1aa

Appendix B 13aa

Appendix C 14aa

Appendix D 15aa

Appendix E 17aa

Appendix F 25aa

TABLE OF AUTHORITIES:

Cases:

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 18, 20

Bowers v. Campbell, 505 F.2d 1155 (9th Cir. 1974) 2

PAGE

Chandler v. Roudebush, No. 74-1599 .....10, 17, 18, 19, 20, 21, 22, 24
Communist Party v. S.A.C. Board, 361 U.S. 1 (1961) 21

Day v. Weinberger, 8 EPD ¶ 9771 (D.D.C. 1974) 21

Gnotta v. United States, 397 U.S. 934 (1970) 3
Griffiths v. Hampton (D.D.C. No. 75-1509) 25
Grubbs v. Butz, 514 F.2d 1323 (D.C. Cir. 1975) 12

Jones v. Alfred A. Mayer Co., 392 U.S. 409 (1968) 6

McGee v. United States, 402 U.S. 479 (1971) 13, 14
McKart v. United States, 393 U.S. 185 (1969) 13, 14
Morton v. Mancari, 417 U.S. 535 (1974) 4

Napper v. Schnipke, 393 F.Supp. 379 (E.D. Mich. 1975) 21

Penn v. Schlesinger, No. 74-476 10
Petterway v. Veterans Administration Hospital, 495 F.2d 1223 (5th Cir. 1974) 2
Place v. Weinberger, No. 74-116 7

Robinson v. Warner, 8 EPD ¶ 9452 (D.D.C. 1974) 22

Salone v. United States, No. 74-1600 .....3, 6, 19, 20
Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) 5, 6

United States v. Borden Co., 308 U.S. 188 (1939) 4, 5
United States v. Mississippi, 380 U.S. 128 (1965) 4
United States v. Testan, No. 74-753 3

Wood v. United States, 41 U.S. 342 (1842) 4

Statutes: PAGE

28 U.S.C. §1331 8
28 U.S.C. §1391(e) 3
Administrative Procedure Act 8
Civil Rights Act of 1866, 42 U.S.C. §1981 .....2, 8, 9, 12
Civil Rights Act of 1964, Title II 6
Civil Rights Act of 1964, Title VII
Section 703 6
Section 704 6
Section 705 6
Section 706 .....5, 6, 7, 8
Section 717 .....*Passim*
Mandamus Act 8
Tucker Act 8

Regulations:

5 C.F.R. §713.213 11
5 C.F.R. §713.217(a) 11
5 C.F.R. §713.217(b) 11
5 C.F.R. §713.218(g) 19
5 C.F.R. §713.233 11
5 C.F.R. §713.281 18
5 C.F.R. §713.283 12

Other Authorities:

United States Commission on Civil Rights, The Federal Enforcement Effort—1974, Vol. V, To Eliminate Employment Discrimination (1975) 18

PAGE

S. Conf. Rep. No. 92-681, 92nd Cong., 2d Sess. (1972).... 7

S. Conf. Rep. No. 92-899, 92nd Cong., 2d Sess. (1972).... 7

Oversight Hearings Before the Subcommittee on Equal Opportunities of the House Committee on Education and Labor, 94th Cong., 1st Sess. 15, 18, 25

110 Cong. Rec. 5

Federal Rules of Civil Procedure, Rule 25(d)..... 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-768

CLARENCE BROWN,

Petitioner,

v.

GENERAL SERVICES ADMINISTRATION, *et al.*

REPLY BRIEF

Petitioner submits this Reply Brief in response to the brief of respondents in this action and in response to contentions bearing on this case advanced by the government in *Chandler* v. *Roudebush*, No. 74-1599.

ARGUMENT

I.

Section 717 Did Not Repeal Pre-Existing Statutory Remedies.

The government suggests at the outset that in deciding whether section 717 repealed all, or most, pre-existing statutory remedies, the Court neither decide nor consider what those remedies might be or whether they exist at all. Brief for Respondents, p. 35, n.18. ("R.Br."). Such an approach would require the Court to construe section 717

without taking into account the nature of the independent judicial remedies which might be abolished or preserved by its decision. Petitioner believes it would be inappropriate for the Court to deliberately close its eyes to the consequences of its decision. Whether federal employees had a judicial remedy prior to 1972 is fairly comprised within the question presented as articulated in the petition for writ of certiorari; the question of whether section 717 repealed *pro tanto* the 1866 Civil Rights Act, etc., can only be answered in the affirmative if federal employees previously enjoyed rights under those acts.

It would be inappropriate to delay further a decision as to whether petitioner is entitled to a trial on the merits of his claims. If this Court remands the case to the Second Circuit and it rules that petitioner cannot sue under the pre-1972 statutes, certiorari will again be necessary because the circuits[1] will be divided on the question. Such a remand will postpone for yet another two years the decision in this case, which arises out of events in 1971 and which was delayed by the government's inexcused failure to promptly process petitioner's administrative complaint.

The government, it should be noted, does not squarely assert that federal employees had no right to sue prior to 1972. On the contrary, the Solicitor General apparently feels constrained not to advance such a contention in light of past representations made by the government to Congress and this Court. In 1970 the Department of Justice advised Congress that the federal courts already had jurisdiction over claims that federal officials had acted in violation of the law or constitution. In 1971 the Civil Service

[1] See *Bowers* v. *Campbell*, 505 F.2d 1155 (9th Cir. 1974); *Petterway* v. *Veterans Administration Hospital*, 495 F.2d 1223 (5th Cir. 1974).

Commission advised Congress that federal employees aggrieved by employment discrimination had a right to sue under statutes then in existence.[2] In opposing certiorari in *Gnotta* v. *United States*, 397 U.S. 934 (1970), the Solicitor General maintained that sovereign immunity did *not* bar Mr. Gnotta from suing for injunctive relief if he had been denied a promotion because of his national origin. The government contended that the complaint in *Gnotta* was defective solely because Gnotta had named the wrong federal defendants, and that he was free to commence a new action against the right ones.[3] In view of the Solicitor General's position in *Gnotta* v. *United States*, and of the Civil Service Commission's assertion to Congress that it was incorrectly decided, it is not surprising that the government does not here rely on the court of appeals decision in this case. Nor does the government contend, as it did in *Gnotta*, that petitioner sued the wrong federal officials.[4]

[2] Brief for Petitioner, pp. 11-13.

[3] "The proper parties defendant in this case, for the purposes of mandatory relief, were the individual Civil Service Commissioners, who could have been sued in their official capacity in the district court under 28 U.S.C. 1391(e). Nothing in the decision of the court of appeals would prevent petitioner now from suing the Commissioners in the district court under 28 U.S.C. §1391(e)." Memorandum For The Respondents In Opposition, *Gnotta* v. *United States*, No. 928, October Term, 1969, pp. 2-3. The Solicitor General declined to take a position as to whether *Gnotta* could sue for back pay. *Id.*, p. 3. In *United States* v. *Testan*, No. 74-753, the government appears to adhere to this position that sovereign immunity provides no protection for federal officials who act "in a manner inconsistent with a specific constitutional prohibition or beyond their statutory powers." Reply Brief for United States, p. 10.

[4] In *Salone* v. *United States*, No. 74-1600, the United States moved to dismiss the complaint for failure to join the Secretary of the Air Force, on the ground that he was an indispensable

The government maintains that section 717 must be construed to have repealed all pre-existing remedies unless it is clear that Congress intended not to do so. R. Br. 19, 26. At least since *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 363 (1842), the law has been exactly the opposite; such an implied repeal can be found only in the face of "a clearly expressed congressional intent" to void the earlier law. *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974). That principle is equally applicable where the asserted repeal is based on the fact that the two laws provide remedies for the same misconduct. "The more natural, if not the necessary inference in all such cases is, that the Legislature intend the new laws to be auxiliary to and in aid of the purposes of the old law, even when some of the cases provided for may equally be within the reach of each." *Wood* v. *United States*, 41 U.S. (16 Pet.) at 363. In *United States* v. *Borden Co.*, 308 U.S. 188 (1939), expressly relied on by this Court in *Morton* v. *Mancari*, 417 U.S. at 551, the Court stressed that to establish a repeal "[i]t is not sufficient . . . to establish that subsequent laws cover some or even all of the cases provided for by [the prior Act]; for they may

party, and later moved to dismiss on the ground that the Secretary, who had been so joined, was not a proper party at all. Petition for Writ of Certiorari, No. 74-1600, p. 7, N.13. Petitioner maintains that, except to the extent that a complainant seeks to establish personal monetary liability on the part of a defendant, all such government motions are frivolous. Regardless of which government official is the nominal defendant, all papers are served on the same government attorneys and the same attorneys defend the suit. Compare Rule 25(d), Federal Rules of Civil Procedure. With the exception noted, motions to dismiss, grounded on the contention that plaintiff has not named the correct federal defendant, rests on a distinction of no practical significance, serve only to delay resolution of the merits of the case, and should not be entertained by the lower courts. Compare *United States* v. *Mississippi*, 380 U.S. 128 (1965).

be merely affirmative, or cumulative, or auxiliary." 308 U.S. at 198-199.

The government properly notes that the adoption of Title VII of the 1964 Civil Rights Act did not repeal the pre-existing rights of private employees. R. Br. 20-21, 25. Most of the contentions advanced by the government for its claim that section 717 repealed the rights of federal employees are in no way distinguishable from the facts applicable to private employees. The government stresses that Congress in 1972, when it adopted §717, was at best uncertain whether federal employees had any other judicial remedies, and therefore could not have intended to preserve those remedies; but in 1964, when it adopted Title VII, Congress was even more convinced that private employees had no such remedies.[5] Petitioner maintains that, as the government contended in *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969), the understanding of Congress as to whether there was a pre-existing statute is largely irrelevant.[6]

Section 1981 would, of course, give a cause of action to an employee who failed to sue within the time provided by section 717, but it also does so for private employees who do not act within the period set by section 706; the mere existence of such time limits does not warrant an inference that Congress attached such immense importance thereto

[5] Congressman Rodino remarked, "Up to this moment the Congress of the United States . . . has failed to act against discrimination in employment." 110 Cong. Rec. 1539. Congressman Ryan described Title VII as "an important first step in an area where the federal government previously has refused to intervene." 110 Cong. Rec. 1643. See also 110 Cong. Rec. 1540, 1592-95, 1599-1602, 1626-31, 1638-39, 1645, 2601-02, 7207, 7218, 7242, 7712.

[6] Brief for the United States as Amicus Curiae, No. 33, October Term, 1969, pp. 29, 31, n.14.

as to want to repeal all other statutes.[7] Although the government characterizes section 717 as creating a "comprehensive system" of judicial remedy, that section itself contains only two sentences with regard to judicial relief; the details of that procedure are incorporated by reference to the provisions of Title VII applicable to private employees. See section 717(c) and (d). The delineation of the substantive conduct forbidden to private employers by sections 703 and 704 is far more elaborate than the prohibition in section 717(a). Section 717(b) merely directs the Civil Service Commission to establish an effective procedure for handling complaints of employment discrimination; sections 705-714 specify in far greater detail the procedures to be followed by the EEOC in processing such complaints by private employees.

The government acknowledges that Congress expressly rejected a proposed amendment to section 706(f) to make Title VII an exclusive remedy, but contends this amendment would not have applied to federal employees since the United States is not an employer within the meaningful section 701(b). But section 717(d) expressly makes ap-

[7] Title II of the 1964 Civil Rights Act does not authorize monetary relief, and is in this regard narrower than the 1866 Civil Rights Act. The government, in *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969), expressly rejected the contention that this difference compelled the conclusion that Title II had repealed the earlier act *sub silentio*. "It may be objected that our conclusion is sound only insofar as it focuses on those provisions of Title II which *add* substantive guarantees or remedial machinery and ignores the fact that the new law in some respects *retrenches* on the broad coverage of the 1866 Act. The answer is that, confronted with the same situation with respect to the 1968 housing law, the Court in *Jones* [v. *Alfred A. Mayer Co.*, 392 U.S. 409 (1968)] did not on that account find a *pro tanto* repeal; the same result is compelled here." Brief for the United States as Amicus Curiae, No. 33, October Term, 1969, p. 31.

706(f) through (k).[8] In support of its contention that section 717 was intended to be an exclusive remedy the government quotes the House and Senate reports to describe section 717 as "providing *the* statutory basis for . . . appeal or court access . . ." R. Br. 25 (Italics added by government.) The full quotation, however, has precisely the opposite meaning:

> Each agency of the Federal Government would be responsible for establishing an internal grievance procedure and programs to train personnel so as to enable them to advance under the supervision of the Civil Service Commission. If final action had been taken by an agency or the Civil Service Commission, an aggrieved party could bring a civil action under the provisions of section 706. The House bill did not cover Federal employees. The House receded. In providing the statutory basis for *such* appeal or court access, it is not the intent of the Committee to subordinate any discretionary authority or final judgment now reposed in agency heads by, or under, statute for national security reasons in the interests of the United States. (Emphasis added)[9]

The word "such", omitted from the government's brief, clearly refers to the civil action under section 706 men-

[8] The government appears to want the Court to apply to it from 706(f)-(k) only those provisions limiting the rights of employees. Thus, the government asserts that the two-year limitation on back pay in section 706(a) should apply to it, Memorandum For Respondents In Opposition, *Place* v. *Weinberger*, No. 74-116, p. 3, although that limit refers to the filing of a charge with the EEOC, but that, insofar as section 706 contemplates a trial *de novo*, that it should be held inapplicable.

[9] H. Conf. Rep. No. 92-899, 92d Cong., 2d Sess. 21 (1972), Legislative History 1841; S. Conf. Rep. No. 92-681, 92d Cong., 2d Sess., 21 (1972), Legislative History 1819.

tioned two lines earlier. Section 717 is thus described, not as "the" basis for all federal employment suits, but as the basis for such suits under the procedures of section 706.

Throughout the lengthy legislative history of the 1972 Act, with the exception of the unsuccessful Senate amendment, not a single Senator, Congressman, Report or witness urged repeal of any pre-existing remedy, and none ever stated that section 717 was intended to be an exclusive remedy, that cutting off all remedies from federal employees who did not sue within 30 days was an important congressional policy, or that restricting judicial remedies would somehow improve the administrative process. From the bare bones of section 717 the government contends that this was the secret intent of Congress,[10] and that what Congress did say, that federal employees were to have the same rights and remedies as private employees,[11] was precisely the opposite of what it meant. On this foundation the government would have this Court conclude that Congress intended to repeal, in whole or part, the 1866 Civil Rights Act, the Mandamus Act, the Tucker Act, the Administrative Procedure Act, and 28 U.S.C. §1331. The government invites the Court to construe section 717, not as expanding the rights of federal employees, but as the most sweeping repeal of anti-discrimination remedies since the end of Reconstruction. The invitation should be declined.

The government essentially concedes that, to the extent that petitioner seeks forms of relief not available under Title VII, he still has a remedy under the pre-1972 statutes. R. Br. 34, n.17. The government notes that among those unavailable remedies is damages against the allegedly discriminatory officials in their individual capacities. The com-

[10] R.Br. 18, 19, 21, 26, 31, 32, 33.

[11] Brief for Petitioner ("P.Br."), 11-13.

plaint in this action names as defendants those officials, and asks the court for "such relief as may be appropriate, including injunctive orders, damages, costs, attorney's fees and back pay." A 14a. The prayer asks for literally any relief whatever which may be appropriate; the enumeration is clearly not intended to be exclusive. The request for damages is broad enough to encompass both compensatory and punitive damages as against both the government and the defendant individuals. Even if the form of the prayer were far more restricted, that request does not ordinarily limit the relief which can be granted. Thus even on the government's view, petitioner's right to maintain this action was not fully withdrawn by Title VII.[12]

II.

Petitioner Should Not Be Required to Further Exhaust Administrative Remedies.

Petitioner maintains, for the reasons set out in his brief,[13] that it would be inappropriate to establish an exhaustion requirement for federal employees who wish to sue under statutes other than section 717. In the instant case, however, petitioner did in fact consume almost two years in the administrative process prior to filing suit. Petitioner maintains that he cannot be required to do more.

[12] The government notes that the court of appeals opinion does not expressly consider this problem; the failure of the court of appeals to discuss this problem in its opinion cannot render unreviewable an otherwise defective decision. The question of whether Title VII repealed the right of federal employees to sue individual supervisors for damages under the 1866 Civil Rights Act, etc., is clearly "fairly comprised" within the question of whether Title VII repealed *all* rights of federal employees to sue under those statutes. R.Br. 34, n.18.

[13] P.Br. 45-60.

In its brief in *Chandler* v. *Roudebush*, No. 74-1599, the government states with regard to the administrative process for handling complaints of employment discrimination, *"The employee's only burden is to file an administrative complaint and to furnish any information available to him."*[14] Petitioner maintains that that is all the government can reasonably ask by way of exhaustion. As a practical matter virtually all the relevant evidence is in the hands of, or under the control of, the government itself; the employment records are official documents and almost all witnesses are federal employees.[15] So long as an employee has notified the government of his grievance and answered any inquiries for additional information, he has given the government precisely what it asks for in this case—"an opportunity to correct its own errors." R. Br. 42.

Both petitioner in this case, and the petitioners in *Penn* v. *Schlesinger*, No. 74-476, gave the government such notice. Indeed, as a result of the subsequent litigation, the facts of these cases are by now known to most attorneys and officials responsible for federal employment discrimination litigation in the Civil Service Commission and the Department of Justice. No claim is made that these petitioners have withheld relevant information requested by the government. On the contrary, Brown fully cooperated in the investigation of his case and the government has never sought any information whatever from the petitioners in *Penn*.

The problem arises because the regulations require an employee to do far more. Section 717(b) contemplates that, once the government learns of a complaint, there will be a thorough investigation, and resolution on the merits,

[14] Brief for the Respondents, No. 74-1599, p. 63, n.37 ("C.R.Br.").

[15] Where they are not, of course, the employee is powerless to compel their attendance.

of any instance of possible discrimination, and that the investigation will not end until the Commission either concludes there is no discrimination or finds that there is and orders unappropriate remedy. But under part 713 even after an affected employee has brought the discrimination to the attention of his superiors, the employees must come forward at least 5 more times[16] and affirmatively demand further processing. If at any point he fails to do so the regulations excuse, and may even forbid, the responsible officials from completing an inquiry as to whether section 717 (a) has been violated. Because of this system, out of approximately 30,000 complaints of discrimination made each year to Federal EEO counsellors, only a few hundred are completely processed through a final decision on the merits.[17]

Petitioners maintain that to the extent that exhaustion is required, the government is entitled only to notice of the charge of discrimination and disclosure, on request, of information in the employees. Under the present system less than 2% of the federal employees who complain of dis-

[16] (1) After notifying the EEO counsellor the employee must indicate he is dissatisfied by any counseling received in order to obtain a "right to complain" letter. §713.213(a). (2) After receipt of that letter the employee must, within 15 days, file a written complaint. (3) After the investigation, the employee must indicate he is not "satisfied" with any adjustment the agency has proposed. §713.217(a). (4) If he does so he must, within 15 days of an appropriate notice, indicate he wants a hearing. §713.217(b). (5) After the agency makes its decision the employee must, within 15 days, indicate he wants the Appeal Review Board to consider the matter. §713.233(a).

[17] In petitioner's case the government knows of Brown's grievance, but objects that it is "unable" to do anything about it because §713.233 forbids the Appeals Review Board to act if there is no notice of appeal within 15 days of Final agency action. In *Penn* the government objects that it is "unable" to do anything because §713.213-14 forbids any agency to even begin action on a well-known complaint except where six conditions are met.

crimination obstinately reassert their claims the five times necessary to assure processing through the Appeals Review Board.[18] At that rate adoption of the exhaustion rule sought by the government would render section 1981, etc., unavailable to the vast majority of federal employees; if, as a result of that rule, all federal employees who complained to EEO counsellors processed their grievances through the Appeals Review Board in order to be able to sue under section 1981, the number of hearings would increase by a factor of 10, the number of appeals by a factor of 50. Under the former circumstance the government's exhaustion rule would sanction a pattern of official refusal to look into most allegations of discrimination; under the latter it would so flood the system with complaints as to grind it to a halt—in neither would that rule, as the government implies, encourage reform of the system. R. Br. 54. If, after giving the government fair notice, the employee commences a lawsuit, that action in no way "aborts" the administrative proceeding. See R. Br. 32, 33. Nothing in the regulations permits an agency or the Commission to discontinue processing an administrative complaint because of pending litigation, and it is not the government's practice to do so. See *Grubbs* v. *Butz*, 514 F.2d 1323 (D.C.Cir. 1975); 5 C.F.R. § 713.283.

The government urges that section 717 reflects an important congressional policy that the Civil Service Commission, rather than the courts, should be "the foundation" of enforcing that ban on discrimination,[19] that Congress determined "to maintain the Commission as the expert

[18] Of approximately 30,000 such charges in the last Fiscal year, the Appeals Review Board finally resolved only 570 on the merits. R. Br. 53a.

[19] R. Br. 46.

agency in such matters," [20] and that Congress intended to require federal employees to pursue all administrative procedures as a precondition of suit because it thought that this would lead to "the development of effective administrative remedies".[21] Nowhere in the legislative history of section 717, however, did any member of congress announce or intimate any such policy. The statements that are made were directly to the contrary—that the Commission had no expertise, that existing exhaustion requirements, if any, should be drastically reduced, and that the Commission's enforcement activities had been so ineffective as to require a judicial remedy.[22] The stated reason for leaving administrative jurisdiction in the hands of the Civil Service Commission was not that Congress thought the Commission competent or likely to become so, but solely because EEOC had too great a backlog to handle those additional responsibilities.[23]

The distinction between the limited exhaustion requirement suggested by the government in *Chandler*, and the more drastic requirement urged in this case, is well illustrated by the difference between *McGee* v. *United States*, 402 U.S. 479 (1971) and *McKart* v. *United States*, 393 U.S. 185 (1969). In *McGee*, a prosecution for failure to submit to induction, the defendant maintained that his I-A classification was improper, and that he should have been classified as a ministerial student. McGee "had never requested that classification nor had he submitted information which would have been pertinent to such a claim." 402 U.S. at 486. This Court concluded that McGee had attempted "to sidestep the administrative process and make the first

[20] R. Br. 46.

[21] R. Br. 73.

[22] P. Br. 49, 50, 51.

[23] P. Br. 39, n.72.

serious case for an exemption". 402 U.S. at 487. On these facts the Court concluded that McGee had failed to present his exemption claim to his draft board and so could not do so in Court. In *McKart*, also a draft prosecution, the defendant had in fact sought a IV-A exemption and had provided his board with all necessary factual information in his possession. McKart, however, had not appealed the denial of that exemption to the appeal board, which would have considered such an appeal *de novo*, and had not submitted to a preinduction physical which, if failed, would have barred induction and obviated the need for judicial review of his exemption claim. This Court, however, held McKart had fairly notified his board of his exemption claim and could therefore litigate his classification in court, even though there were other steps he could have taken that might have prevented his induction order. 395 U.S. at 197-203.

Any requirement of further exhaustion would be particularly unwarranted on the facts of this case. When petitioner first filed his administrative complaint, the applicable regulations required the agency to render a decision within 60 days. R. Br. 55. In fact, however, the agency did not decide the case for 617 days. P. Br. 63. The government now contends that he waived his right to invoke this delay to avoid further exhaustion by failing to exhaust his administrative remedies against administrative delay by complaining to the Civil Service Commission. R. Br. 56. The government does not, however, contend such a complaint to the Commission would have been fruitful; on the contrary, even though the deadline is 180 days, a majority of all administrative proceedings take longer than that.[24] Only last year the Chairman of the Civil Service Commission testified that, although it had the power to act if the

[24] See p. 18, infra.

180-day rule were violated, "[Q]uite frankly, we don't have the resources to do this".[25]

It is manifestly unfair to impose on petitioner exhaustion rules thought up by the government literally years after this suit was commenced. The notice which petitioner received from the government in March, 1973, in no way intimated that he was obliged to file any further administrative appeal in order to perfect or protect his right to sue. A. 45a. Throughout the proceedings in the district court, and the appellate briefs, petitioner expressly assumed and asserted, and the government did not deny, that petitioner had adequately exhausted his administrative remedies by obtaining a final agency decision. In June, 1974, 13 months after the action was filed, the government at oral argument in the court of appeals advanced its first exhaustion standard, that an employee must also obtain a decision by the Appeals Review Board. In March, 1975, 22 months after the action was filed, the government in opposing certiorari suggested a second exhaustion standard, that an employee could sue after final agency action provided he did so within 30 days. Brief For the Respondents In Opposition, pp. 6-7. In October 1975, 29 months after the action was commenced, the government advanced its third exhaustion standard, that an employee who had experienced unreasonable delay could sue after final agency action provided he had complained about the delay to the Commission. R. Br. 55-56. Petitioners maintain that each of these standards is incorrect; equally important, there was no way he could have known in 1973 which of these

[25] Oversight Hearings Before the Subcommittee on Equal Opportunities of the House Committee on Education and Labor, 94th Cong., 1st Sess., p. 172. On November 26, 1975, petitioners asked the government to disclose the number of cases, if any, in which it had acted to remedy such agency delay. Pp. 19aa-20aa. On February 13, 1976, the government declined to disclose this number. P. 27aa.

was the correct rule or which might years later be advocated by the government. The government contends the regulations "leave little room for doubt concerning 'the "correct" way to exhaust' ". R. Br. 53. But none of the three rules advanced by the government can be found anywhere in the regulations; it would be unconscionable to penalize a GS-7 clerk with a high school education because, in a brief period in 1973, he was unable to foresee the exhaustion rules that the best attorneys in the Civil Division and the office of the Solicitor General would not "discover" for several years thereafter.

The government concedes that, in cases such as petitioner's where the agency has found no discrimination, the Appeals Review Board overturns that finding in only 1 case out of 50. R. Br. It appears that, among cases in which discrimination is found, back pay is awarded in perhaps 1 case out of 4.[26] Thus, out of every 200 appeals taken in cases such as petitioner's, only 1 employee would receive any back pay as a result. The efficient administration of justice does not require that 199 employees pursue such an unsuccessful appeal merely to relieve the courts of handling a single back pay claim. Even if petitioner had the good fortune to be that lucky employee, he still would have had to sue to get the other relief which he seeks and which is not available under any circumstances in the administrative process—costs, attorneys' fees, and damages other than back pay.

[26] The statistics in n.28 of the government's brief, whose accuracy is concededly in doubt, suggest there were only 40 awards of back pay among the 180 cases in which discrimination was found in 1974.

III.

Section 717 Requires a Trial *De Novo*.

In its brief in this case the government urges that repeal of all pre-1972 remedies and adoption of one of its exhaustion standards are necessary to avoid interfering with what the Solicitor General maintains is a critical purpose of section 717—to deprive federal employees of trials *de novo*. R. Br. 32. Petitioner maintains that, even if section 717 does not authorize a trial *de novo* in some or all circumstances, that is no reason to imply a repeal of the other statutes in question or to establish any of the exhaustion rules advanced by respondents. In light of this contention by the government, however, petitioner believes it appropriate to offer certain comments on the arguments advanced by the government in *Chandler* v. *Roudebush*, No. 74-1599.

It is helpful to note what is, and is not, at issue in *Chandler*. The two practical consequences of whether there is a trial *de novo* are first, whether the court should consider additional evidence not contained in the administrative record, and, second, whether the court should make independent determinations of fact. Regardless of whether there is a trial *de novo*, there is no need to redo all that occurred in the agency proceedings; that record would, subject to the normal rules of evidence, be directly admissible in court. On the other hand, as the government recognizes, the court would be required to become fully familiar with all the facts of the case, at least so far as they can be determined by reading the administrative record, regardless of what standard it applied.

The government, while insisting that a trial *de novo* is not automatically required by section 717, recognizes a variety of circumstances when such a trial would be re-

quired. The government's approach would require the sort of complex and time consuming case by case evaluation of the prior non-judicial proceedings which led this Court to reject any deferral to the decisions of arbitrators in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 59 (1974).

(1) The government concedes that a trial *de novo* is required where the agency fails to reach a final decision within 180 days, as required by the regulations. 5 C.F.R. § 713.281(b). The government asserts that such violations of the regulations are "isolated", "rare" and "infrequent." Brief for Respondent in *Chandler* ("C. R. Br.") C. R. Br. 15, 74. In fact, however, the *average* time for processing administrative complaints is 201 days.[27] P. Br. 22a. Only last year the Chairman of the Civil Service Commission testified that it had not been able to bring most agencies into compliance with the regulations.[28] It is clear that a substantial majority of all federal employees would, under this exception, be entitled to a *de novo* hearing.

(2) The government recognizes that the court would be obligated to admit any relevant additional evidence which was not contained in a defective record. The Solicitor General stresses that the responsibility for seeking and producing this evidence belongs to the agency; the aggrieved

[27] United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort—1974, Vol. V, To Eliminate Employment Discrimination, p. 80 (1975). The average period for processing such complaints is 367 days in the Department of Health, Education and Welfare, 369 days in the Department of Housing and Urban Development, and 395 days in the Department of Transportation.

[28] Referring to the problem of delay in processing these complaints, Chairman Hampton stated, "This issue was raised last year, and the year before, ever since the passage of the act, and I don't think we have been very successful in getting down the number of days that it takes to process complaints." Oversight Hearings Before the Subcommittee of the House Committee on Education and Labor, 94th Cong., 1st Sess., 1972 (1975).

employee need only complain and offer evidence in his personal possession. C. R. Br. 13, 19, 59, 63, 64-5, and notes thereto. In a part 713 proceeding, unlike for example, an I.C.C. rate hearing, virtually all the relevant evidence is in the hands of the agency; the documents are agency documents and the witnesses are agency employees. This "exception" would be arguably applicable to every instance where an employee wanted the court to consider such additional evidence. The administration of this exception would require the court to permit full discovery and then hold a special hearing to determine if there was any legitimate reason why the agency had failed to produce new evidence thus unearthed.

(3) Under part 713 the hearing is conducted by a complaints examiner but the decision is rendered by the agency head, or his designee, in Washington 5 C.F.R. § 713.218(g). This means that demeanor evidence is *never* available to the agency official who actually makes the determination as to whether there was discrimination. In any case in which demeanor was important the agency proceeding would be inherently defective, since it would have been decided by an official who clearly would not consider all the relevant evidence. This occurred in both *Chandler* and *Salone* v. *United States*, No. 74-1600. An aggrieved employee is entitled to have his case decided by someone who has seen the demeanor evidence. The court would thus be obligated to consider, in each case, whether demeanor evidence was relevant, and if so to require the relevant witnesses to testify in court.

(4) The government justifies the substantial evidence rule by insisting that agency officials who decide these cases are in general, or at least under the regulations ought to be, both unbiased by their dual role as defendant and judge and expert in both personnel matters and Title VII law. If,

in this regard or others, there is a defect in the process as to any particular case, the government maintains that defect is to be remedied in the subsequent judicial proceeding. C. R. Br. 64. But this can only mean that, prior to applying a substantial evidence rule based on assumptions as to the agency's fairness and expertise, the court would be obligated to conduct a detailed factual inquiry, at least if asked to do so by the employee, into whether those assumptions were indeed correct.

(5) The government properly concedes that any error of law in the administrative process can and must be overturned by the court. In all section 717 cases this exception would require that every non-factual decision that was or should have been made, including every inference and every decision refusing to admit evidence, would have to be reconsidered by the district court.

One or more of these exceptions to the government's rule would be potentially applicable to virtually every case. The very process of deciding whether to afford a trial *de novo* would be complicated and time consuming, and inextricably interconnected with the merits of the case. In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), the government opposed any deference to the decisions of arbitrators because "under such a procedure, 'the district court would find itself holding a hearing to determine if [deference] was appropriate, which hearing could . . . in length and complexity be similar to a Title VII trial'".[29] This is equally true with regard to hearings to decide whether to give a trial *de novo*. Were the Court to adopt the government's position, it would be necessary to remand *Chandler* and *Salone* to consider, *inter alia*, whether the defendants

[29] Brief for the United States as Amicus Curiae, No. 72-5847, p. 29.

have any relevant evidence not contained in the record, whether there was any relevant demeanor evidence, whether the agency officials who decided the case were unbiased and expert in both personnel and Title VII matters, and whether any evidence was erroneously excluded. We submit it would be more expeditious, and more consistent with the purposes of section 717, to remand these cases for a simple trial.

In an amicus brief in *Chandler* we previously contended that, in the four years since section 717 was adopted, no federal employee had ever been able to win a case under the government's standard, and that every court limiting itself to that standard had concluded that the agency decision in dispute was supported by substantial evidence.[30] The government maintains this "incorrect", and cites six cases. C. R. Br. 71, n. 45. None of the six cases relied on by the government applied its substantial evidence rule; in each of them the court insisted, instead, on making an independent determination of the relevant facts.[31] Nor did the court in any of these cases restrict in any way the right of the plaintiff to discover and introduce, in addition to the

[30] Brief of the N.A.A.C.P. Legal Defense & Educational Fund, Inc., as *Amicus Curiae*, No. 74-1599, pp. 11-12, n.10.

[31] See, e.g., *Day* v. *Weinberger*, 8 EPD ¶ 9771 p. 6224 (D.D.C. 1974) ("[T]he review of this Court is not limited to the test of whether there is substantial evidence in the record to support the decision of the administrator . . . this Court must make its own decision based upon all relevant evidence"); *Napper* v. *Schnipke*, 393 F.Supp. 379, 385 (E.D. Mich. 1975) ("[T]he court must determine, based on the same standards used in private discrimination suits, whether the complainant has come forward with proof suggestive of discrimination, and whether in such a case an employer has established an absence of discrimination by a preponderance of the evidence.")

administrative record, any other evidence he wished.[22] To permit the discovery and introduction of such evidence, and to require an independent judicial determination of the facts, is the same thing as mandating a trial *de novo;* the cases relied on by the government are unusual only in that, in several of them, the court gave the plaintiff a trial *de novo* but declined to so label the proceeding.

IV.

The Inadequacy of the Administrative Procedure.

The House Committee on Education and Labor, the Senate Committee on Labor and Public Welfare and the United States Commission on Civil Rights have all concluded that the administrative procedure for handling complaints of employment discrimination is entirely ineffective, and in some cases actually impedes the elimination of such discrimination. The Solicitor General does not claim that Congress and the Commission on Civil Rights erred in their conclusions. Nor does the Solicitor General suggest that he has conducted an independent investigation into whether the administrative procedure is, in fact, effective in eliminating employment discrimination. In its brief in this case the government maintains that any defects in the procedure are the exclusive concern of the Civil Service Commission and should not be considered by the courts, R. Br. 50; in *Chandler* the government contends that the courts can and should deal with such defects, not in formulating any general rules for section 717 actions, but only on a case by case basis. C. R. Br. 64. In the instant case the government suggests it is reasonable to "assume" that any defects which existed in 1972 have by now been cured, R. Br. 46; in *Chandler* the government argues that any failure of the Civil Service Commission to deal with those defects is irrelevant. C. R. Br. 37, n.18. The government stresses the existence of regulations authorizing the agencies and Civil Service Commission to act in a salutary manner, R. Br. 36-43, but does not allege that these powers are often or ever exercised. Petitioner's contentions of fact regarding the administrative process are set out in an appendix, pp. 1aa-12aa; the Solicitor General has, in general, declined to take a position on these specific factual issues.

[22] See, e.g., *Robinson* v. *Warner*, 8 EPD ¶ 9452, p. 5058 (D.D.C. 1974) ("At the District Court level, the full gambit of discovery tools can be utilized, including testimony in open court, to supplement the administrative record . . . this procedure will ensure to federal employees that the Court will evaluate *all* the relevant evidence and at the same time prevent an unnecessary duplication of effort.")

The record in this case contains no facts that would support any contention that the findings of the Congress and Civil Rights Commission were in error. It was only at oral argument in the court of appeals that the government first argued that petitioner had not adequately exhausted the administrative remedies, and it was only in its brief in this Court that the government sought to justify such an exhaustion requirement by reference to the nature of the administrative procedure. In the interest of clarifying the underlying factual situation, counsel for petitioner, on November 26, 1975, wrote to the Solicitor General asking for specific statistics bearing on arguments in the government's brief regarding the administrative procedure. Pp. 17aa, 24aa. On February 13, 1976, the Solicitor General declined to provide that information on the ground that the inquiries were "in the nature of pretrial discovery requests or call for legal conclusions or interpretations," or, in some instances, because the information did not exist. Pp. 25aa-27aa. The fact that none of the material was

developed through discovery in the district court is entirely the responsibility of the government, which did not put the matter in issue until it was on appeal. Under these circumstances the congressional findings regarding the defects of the administrative process must be accepted by this Court. *Communist Party* v. *S.A.C. Board,* 367 U.S. 1, 94-95 (1961).

In this case and *Chandler* the government urges that federal employees should have fewer judicial remedies than private employees because the administrative process available to federal employees is more efficacious than the process of investigation and conciliation available to private employees through E.E.O.C. R. Br. 52; C. R. Br. 61. It is true that the E.E.O.C., unlike the officials under part 713, cannot directly order any relief, but in a part 713 proceeding the officials with authority to direct a remedy are also, for all practical purposes, the defendants. Petitioner maintains that the independence of the E.E.O.C., and the resulting vigor and expertise of its staff, are far more important than the nominal but unused powers of agency officials and the Civil Service Commission. This difference is well illustrated by comparing the results of the E.E.O.C. and part 713 proceedings. In the last fiscal year 26,627 federal employees complained to EEO counsellors; out of this group back pay was awarded to less than 50. P. Br. 85; R. Br. 49. The E.E.O.C. received a total of 55,885 charges of discrimination, and obtained through conciliation back pay for 49,388 individuals. Pp. 13aa-14aa.

There appears to be a problem of discrimination in the selection of the personnel who administer the administrative procedure. Although 34% of all federal employees are women, only 2.2% of the Civil Service investigators and 10.7% of the complaints examiners are women. While

minorities are 21 per cent of all federal employees, only 4.3% of the Civil Service investigators and 10.7% of the complaints examiners are non-white. Pp. 16aa-17aa. In half of the 10 Civil Service regions all these investigators are white males.[33] A serious claim of racial discrimination in the selection of Appeals Review Board personnel is now the subject of litigation in the District Court for the District of Columbia.[34] The government concedes that, in cases decided on the merits, the Appeals Review Board affirms findings of discrimination in 98% of all cases. R. Br. 57. The government urges, however, that the affirmance rate of the courts of appeals is also high. R. Br. 58. But the significance of the affirmance rate must take into account what occurred below. In the agency proceedings the agency finds itself innocent of discrimination in at least 87% of all cases decided on the merits;[35] no such pattern exists among the district courts.

---

[33] Atlanta, Denver, Chicago, Boston and Seattle.

[34] *Griffiths* v. *Hampton* (D.D.C. No. 75-1509).

[35] Oversight Hearings Before the Subcommittee on Equal Opportunities of the House Committee on Education and Labor, 94th Cong., 1st Sess., p. 169 (1975).

CONCLUSION

For the above reasons, the judgment and opinions of the Second Circuit should be reversed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
MELVYN R. LEVENTHAL
BARRY L. GOLDSTEIN
BILL LANN LEE
ERIC SCHNAPPER
10 Columbus Circle
New York, New York 10019

JEFF GREENUP
200 West 135th Street
New York, New York 10030

Counsel for Petitioner

APPENDIX

Appendix A

Factual Contentions Concerning Working of the EEO Procedures

Introductory Note: This appendix lists the various assertions that have been made concerning the adequacy of the Civil Service Commission's EEO procedures. The listing is done on a chronological basis, *i.e.*, from the beginning of the process at the counseling stage through the appeal to the Appeals Review Board. Three additional sections cover corrective action, alternative procedures, and matters generally applicable to the entire procedure. The sources for each statement are cited as follows: (1) United States Commission on Civil Rights, Report, *The Federal Civil Rights Enforcement Effort, 1974,* Volume V, to Eliminate Employment Discrimination—*e.g.*, "C.R.C., p. 61 (p. 3aa)";* (2) Brief of the NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae,* in *Chandler* v. *Roudebush,* No. 74-1599, *e.g., "Chandler amicus,* p. 7a"; and (3) the Brief for Petitioner in the present case, *e.g., "Brown,* p. 63."

In those instances where the government has responded to an allegation, the response is cited in a footnote, with references to either the government's brief in *Brown, e.g.,* "U.S.B., p. 50," or *Chandler, e.g.,* "U.S.C. p. 58, n. 33."

I.

Counselling

1. The Civil Service Commission (CSC) refuses to recognize the concept of a continuing violation. (C.R.C., p. 65 (p. 7aa)); *Chandler amicus,* p. 12a).

---

* The page number in parenthesis is a citation to Appendix B to petitioner's main brief in this case, which reproduces a portion of the Civil Rights Commission Report.

Appendix A

2. Corrective action is not given for any act occurring before 30 days prior to the complainant going to a counselor (*Chandler amicus*, p. 12a).

3. The 30-day filing requirement is strictly enforced despite § 713.214(a)(4). (*Chandler amicus*, p. 13a).[1]

4. Counselors are not full-time EEO persons (*Chandler amicus*, p. 14a).

5. Counselors can seek only an informal resolution. Corrective action cannot include back pay or a retroactive promotion; it is usually limited to "training" or "consideration" for a position that often does not materialize (*Chandler amicus*, p. 14a, CRC, p. 67 (9aa)).

6. There is no accurate data as to what kind of corrective action is provided through counseling (*Chandler amicus*, p. 15a).[2]

7. Only 10% of complainants file formal complaints because many are misled, intimidated, or not encouraged to file. (*Chandler amicus*, p. 15a; CRC, p. 66 (8aa)).[3]

---

[1] The government has not contested the accuracy of this statement, but has only sought to justify the practice by drawing an analogy to the 30-day statute of limitation for filing suit (U.S.C. p. 56, n.30). The attempted analogy fails, however, since a complainant is informed of the 30-day limitation period by a letter whose receipt begins the period's running.

[2] The government, in its letter to counsel for petitioner, acknowledges that the CSC does not have reliable data as to corrective actions taken (App. B, *infra*, p. 26aa).

[3] Although not directly denying that many complainants do not file because of improper actions by counselors, the government suggests that many do not because of adequate corrective actions (U.S.C., p. 57, n.31). As pointed out in n.2, however, the government also acknowledges that there is no reliable data as to what kind of corrective actions are provided.

Appendix A

II.

Complaint Filing

8. The fifteen day rule for filing the formal complaint is rigidly enforced despite the language of § 713.214 (a)(4). (*Chandler amicus*, p. 16a).

9. Complaints are rejected because they are sent to the wrong office (*Ibid*).

10. Some agencies do not consider the complaint filed until receipt is formally noted; this is delayed by EEO officers attempting to resolve the matter informally (*Ibid*).

11. Complaints must name a specific "alleged discriminatory official," and are rejected as not being specific enough if they do not. (*Chandler amicus*, pp. 16a-17a).

12. Focus of the entire process is still on individual overt acts of discrimination despite congressional criticism. (CRC, pp. 65-66 (7aa-8aa); *Chandler amicus*, p. 17a).[4]

13. A significant number of complaints are rejected as "not within the purview" of the Chapter 713 regulations. (CRC, p. 68 (10aa); *Chandler amicus*, p. 19a).

14. The Commission has refused to allow class complaints to be raised as part of the individual complaint process. (CRC, pp. 68-69) (10aa-11aa); *Chandler amicus*, p. 19a).

---

[4] The government does not deny this, but rather defends this practice. (U.S.C., pp. 68-69, 75, n.48). Indeed, the thrust of the respondent's brief in *Chandler* is based on the same misapprehension of a Title VII proceeding as has the CSC, *viz.*, the inquiry is limited to whether a particular supervisor is prejudiced.

Appendix A

15. If a complainant follows a wrong procedure, his complaint is forever barred even if his initial attempt is timely. (*Chandler amicus,* pp. 23a-24a).

16. A complainant (and federal employees generally) are not given any explanation or guidance as to alternate procedures or the consequences of following one procedure rather than another (CRC, pp. 64-65 (6aa-7aa); *Chandler amicus,* pp. 29, 23a).

17. EEO officers are often part of the same division as are personnel officers who may be the target of EEO complaints (*Chandler amicus,* p. 28).

III.

The Investigation

18. EEO investigators are virtually always employees of the agencies. (CRC, p. 70 (p. 12aa); *Chandler amicus,* p. 24a).

19. Investigators lack expertise in Title VII law and need not have particular expertise in relevant personnel matters. (*Chandler amicus,* p. 20; CRC, p. 70 (p. 12aa)).

20. Investigations are severely limited as to both time and scope in contrast to EEOC investigations (CRC, pp. 71-75 (13aa-18aa); *Chandler amicus,* p. 25a).[5]

21. The investigator is instructed not to enlarge the scope of the investigation beyond the specific issue complained of (*Chandler amicus,* p. 25a).

[5] The government does not deny that investigations are in fact so limited; it asserts that a "proper" investigation "should normally" be sufficient, without giving any data as to whether any such investigations are conducted. (U.S.C., p. 64, n.39).

Appendix A

22. Complainant has no way, such as discovery devices, to require the investigator to look into any particular matter, has no control over the scope of the investigation, and does not have the right to be present or have questions asked of witnesses (*Chandler amicus,* pp. 25a-26a).

23. The investigator must rely on local agency personnel for information (*Ibid*).

24. Investigative reports commonly consist of a compilation of conclusory affidavits as to whether a particular person is discriminatory. (*Chandler amicus,* p. 26a).

25. Proposed resolutions are limited; back pay cannot be given, and the typical relief is training or "consideration" for future vacancies. (*Chandler amicus,* p. 27a).

IV.

Hearing

26. Complaints examiners do not have expertise in Title VII law. (CRC, p. 76 (18aa); *Chandler amicus,* p. 28a).

27. A complainant has no right to conduct discovery through interrogatories, pre-hearing examination of witnesses or documents, or otherwise, and requests to do so are denied. (*Chandler amicus,* pp. 25, 28a).[6]

[6] The government asserts that denials of "reasonable" requests for information can be corrected. It does not claim, however, that such requests can be other than for production of evidence *at the hearing* itself, nor does it give any indication as to the number of occasions on which *any* denials are reversed. (U.S.C., p. 64, n.39).

Appendix A

28. Non-government employee witnesses cannot be made to testify. (*Chandler amicus,* p. 26).

29. The agency has full access to documents and witnesses *before* the hearing so as to be able to fully prepare its case. (*Chandler amicus,* p. 28a).

30. Complainants are generally represented by lay persons, while agencies are usually represented by counsel. (*Chandler amicus,* p. 29a).[7]

31. The hearing is not adversary in nature (CRC, p. 77 (19aa); *Chandler amicus,* p. 29a).

32. Although a complaints examiner has the responsibility to elicit testimony and obtain witnesses and evidence, he often fails to do so. (*Chandler amicus,* pp. 29a-31a).

33. Complaints examiners refuse to obtain witnesses and documents requested by complainants, and rules restrictively as to the relevance of evidence. These evidentiary rulings are routinely upheld by the Appeals Review Board. (CRC, p. 78 (20aa); *Chandler amicus,* pp. 27, 30a-31a).[8]

[7] The government does not deny either assertion. It only states that complainants "often have *available* . . . attorneys without charge," without stating how often complainants are in fact represented. (U.S.C., p. 58, n.33). The government notes the Department of Justice's program of allowing its attorneys to represent employees from other agencies. To our knowledge, however, this authorization (as opposed to representing complainants within the Department of Justice) was only disseminated in November, 1975 (Office of the Attorney General, Memorandum to All Employees, Subject: Representing Equal Employment Opportunity Complainants, November 20, 1975).

[8] The government asserts that "the complainant has complete authority over the way his complaint is presented." (U.S.C., p. 64, n.38), but does not deny that, as a fact, evidence the complainant wishes to introduce is routinely rejected and such rejections are routinely affirmed. We believe that the government's assertion is simply wrong; as recently as September 16, 1975, CSC/ARB again reaffirmed the *Complaints Examiners'* power over the conduct of the hearing and what evidence would be introduced or even looked at. Their decisions would be reversed only if "arbitrary or capricious" (ARB decision RB 071360169 Digest 2, p. 31).

Appendix A

34. Although a complainant purportedly does not have the burden of proof (U.S.C., p. 62, n. 37), in case after case if he does *not* prove his case he is ruled against and the decision is affirmed by CSC/ARB. (CRC, p. 78 (20aa); *Chandler amicus,* p. 30a).

35. The complainant does not have the right to see, review or comment upon the recommended decision or transcript prior to the final agency decision. (*Chandler amicus,* 31a).

36. The provision requiring that if an agency does not follow an examiner's recommendation, it must give detailed reasons, is not effectively enforced. (CRC, p. 79 (21aa); *Chandler amicus,* pp. 28, 31a).[9]

37. In Fiscal Year 1974, agencies reversed and refused to adopt 26.6% of the recommended findings of discrimination, but only 1.3% of the findings of *no* discrimination. (CRC, p. 79 (21aa); *Chandler amicus,* p. 32a).

38. Recommended and final agency decisions do not cite Title VII law, and typically limit the inquiry to whether there is proof of overt discrimination by a particular person (*Chandler amicus,* pp. 20, 24).

[9] The government has asserted, without giving figures, that CSC/ARB "has *on occasion* remanded cases" for failure to give reasons. (U.S.C., p. 60, n.34).

Appendix A

39. In the majority of cases there are *not* final agency decisions within 180 days from the date of filing the complaint. (CRC, p. 80 (22aa)).[9a]

40. Complainants are not informed that they waive any rights by choosing not to have a hearing. (*Chandler amicus*, p. 15, n. 14).

V.

Appeal To CSC/ARB

41. In the last three fiscal years, ARB reversed findings of no discrimination in only 3.32% of the cases decided on the merits. (*Chandler amicus*, p. 33a; see also, CRC, p. 82 (24aa)).

42. Including decisions ordering further corrective action there are favorable ARB decisions on other than procedural questions in less than 10% of the appeals. (*Chandler amicus*, p. 33a).

43. The requirement that agencies act in 180 days is not in fact enforced by the CSC (*Brown*, p. 63).

44. ARB members have no expertise in Title VII law or federal personnel matters (*Brown*, p. 65, n. 129; CSC, p. 81 (23aa)).

45. ARB has been sued under Title VII by its black, female member for racial and sex discrimination in promotions; ARB votes have split along racial lines. (*Brown*, p. 65).

46. ARB decisions are *ad hoc*, do not cite or follow Title VII cases, and are not followed as precedent. (CRC, p. 83 (25aa); *Brown*, p. 65).

[9a] The government asserts that such cases are "isolated", but offers no specific statistics. (U.S.C., p. 24).

Appendix A

47. The volume of cases precludes adequate consideration of records. (*Brown*, p. 65).[10]

48. ARB decisions are in reality written by a small number of unqualified appeals examiners. (*Brown*, p. 65; See, CRC, p. 81, n. 277 (23aa).

49. The Civil Service Commission itself has considered reopening ARB decisions only *8* times; only *6* cases were actually reopened. (*Chandler amicus*, p. 3a).

50. CSC does not issue opinions in the reopened cases; its orders are secret and explanatory documents difficult to obtain even though the orders establish precedent. (*Chandler amicus*, pp. 30, 3a-4a).

VI.

Corrective Action

51. Awards of back pay and retroactive promotions are rare. The standard relief given is "training". (CRC, pp. 83-85 (25aa-27aa), *Chandler amicus*, p. 24, 34a).

52. In contrast, the EEOC has obtained substantial back pay relief for large numbers of private employees (*Chandler amicus*, pp. 34a, 91a).[11]

53. Relief to the class or to any person other than the complainant is not given by complaints examiners, agencies, or ARB (*Chandler amicus*, pp. 24, 35a).[12]

[10] The government asserts that ARB "reviews" the records in the cases it decides. (U.S.C., p. 60).

[11] The government urges that the EEOC lacks power to enforce Title VII rights, whereas the CSC has such power (U.S.B., p. 52, n.34). The government does not deny, however, that the actual results achieved by the EEOC far outstrip the CSC.

Appendix A

54. No back pay, either to a class or individuals has ever been awarded in a third-party complaint proceeding under § 713.251 (*Chandler amicus*, p. 35a).

VII.

Alternative Procedures

55. Complainants have not obtained effective relief against harassment or reprisals for filing a discrimination complaint under 713.262(b). (*Chandler amicus*, p. 36a).

56. If discrimination claims are raised under an alternative procedure (e.g., adverse action or grievance), the discrimination claim is not reached if the adverse action is reversed on a procedural ground, hence leaving the underlying discrimination claim unresolved (*Chandler amicus*, p. 37a, and see case cited at 7a, n.2 (now reported at 10 E.P.D. ¶ 10,521)).

---

[12] The government asserts that "the *Commission* . . . possesses the power to remedy systemic or class-wide bias on the administrative level." (U.S.C., p. 65, n.40). As a legal proposition, that is true; indeed we would go further and say that the Commission has not only the power but the *duty* to do so, and that is the basis of the action we successfully prosecuted in *Barrett* v. *United States Civil Service Commission*, 10 E.P.D. ¶ 10,586 (D.D.C. 1975), now cited with approval in the government's brief in *Chandler*, (p. 65, n.40). The issue is not whether the Civil Service Commission has the power to do what is required by law, but whether, as a matter of fact, it has permitted investigators, complaints examiners, agencies, and ARB to remedy class discrimination by granting broad relief and back pay. As stated in *Chandler amicus* brief, and not denied by the government, the Commission has prohibited such relief.

Appendix A

57. A complainant who opts to proceed under an alternative procedure is not informed by the CSC of his right to file under Title VII even if the merits of his discrimination claim are reached (*Chandler amicus*, pp. 37a-38a).

58. If a complainant files a complaint under part 713 charging that a job qualification is discriminatory and if the qualification in question is one imposed by the CSC, his complaint is simply rejected as "not within the purview" of part 713 and he is not informed of the proper procedure under part 300 (*Chandler amicus*, p. 23a).

VIII.

Criticisms Relating to the System Generally

59. The investigation hearing, and other significant provisions of the 713 regulations were not changed in any meaningful way after the 1972 act was passed (CRC, pp. 61-62 (3aa-4aa); *Chandler amicus*, p. 19).

60. Manuals, ARB decisions, investigative reports, proposed decisions and final agency decisions are devoid of citations to Title VII law and court decisions and do not comply with either (*Chandler amicus*, pp. 20-25; see also, CRC, pp. 77-78).[13]

---

[13] The government acknowledges that agencies and the CSC are bound to follow Title VII law, U.S.C., p. 62. In light of *Morton* v. *Mancari*, 417 U.S. 535 (1974), it could hardly do otherwise. The government does *not* deny, however, that *in fact* Title VII law is *not* followed. Indeed, the government's brief shows the same lack of understanding of Title VII law that characterizes CSC regulations and decisions in its discussion of the "but for" rule (U.S.C., p. 62, n.37). What is wrong with 5 C.F.R. § 713.271 is its reversal of the burden of proof in complete disregard of Title VII decisions of Courts of Appeals and this Court.

Appendix A

61. The Civil Service Commission reversal of the ARB decision described on pages 22-23 of the *Chandler amicus* brief resulted in the subsequent disregarding of statistical evidence in violation of Title VII law (*Chandler amicus*, p. 23, n.19).[14]

62. There are no enforced sanctions when agencies fail to comply with time requirements supposedly imposed on them by the regulations (*Chandler amicus*, pp. 29-30).[15]

63. Agency heads and those delegated to decide EEOC cases have no expertise in either EEO or personnel matters (*Brown*, pp. 49-50).

---

[14] The government asserts that "the Commission has considered statistical evidence of discrimination in adjudicating complaints," and cites the case of *Evans* v. *Lynn*, D.D.C. Civ. No. 630-73 (U.S.C., p. 65, n.40). What the government does not say is that statistical analyses are utilized to *negate* claims of race or sex discrimination, and that *Evans* v. *Lynn* is such a case. Indeed, many investigative reports, agency and ARB decisions contain an exceedingly superficial statistical analysis presented from management's viewpoint (cf. *Rich* v. *Martin-Marietta*, 522 F.2d 333, 342-3 (10th Cir. 1975)) that purports to show no discrimination. Contrary to the government's position, the non- or mis-use of such data is highly relevant to the question of whether such administrative decisions should be given any weight whatsoever by a federal court charged with enforcing Title VII.

[15] The government claims that petitioner here should have sought relief from the Commission for the failure by the agency to comply with the time requirements (U.S.B., pp. 55-56). No claim is made that the Commission in fact responds to such requests. For an account of the futility of attempting to get such action, see the case described on page 7a, n.2 of the *Chandler amicus* brief. As of the end of February, 1976, the CSC has still not even acknowledged receipt of the request to require processing of the complaint in that case.

Appendix B

[EMBLEM]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

November 21, 1975

IN REPLY REFER TO:

Mr. Eric Schnapper
NAACP Legal Defense and Educational Fund
10 Columbus Circle
New York, New York 10019

Dear Mr. Schnapper:

This is in response to your telephone call of November 20, requesting data on the number of individuals who received back pay from EEOC conciliation agreements and the cumulative dollar figure of this back pay.

In FY 1975, the number of persons benefitted was 51,216; the dollar figure was $109,669,285; and the number of successful conciliations was 5,983.

In FY 1974, the number of persons benefitted was 49,388; the dollar figure was $56,266,827; and the number of successful conciliations was 4,519.

I hope that this information is useful.

Sincerely yours,

/s/ MARTY ROGERS
Marty Rogers
Special Assistant to the
Executive Director

Appendix C

[Emblem]

Equal Employment Opportunity Commission
Washington, D.C. 20506

December 15, 1975

IN REPLY REFER TO:

Eric Schnapper, Esquire
Legal Defense Fund
Room 2030
10 Columbus Circle
New York, New York 10019

Dear Mr. Schnapper:

This is in response to your request for data on the total number of charges received by the Equal Employment Opportunity Commission in Fiscal Years 1974 and 1975.

In Fiscal Year 1974, the EEOC received 55,885 charges of discrimination. In Fiscal Year 1975, the total number of charges received was 64,542.

Sincerely,

/s/ Marty Slate
Marty Slate
Supervisory Attorney
Office of General Counsel

Appendix D

[Emblem]

United States Civil Service Commission
Washington, D.C. 20415

December 16, 1975

IN REPLY PLEASE REFER TO
YOUR REFERENCE

Ms. Phyllis McClure
Legal Defense Fund, NAACP
1028 Connecticut Avenue, N.W.
Suite 510
Washington, D. C. 20036

Dear Ms. McClure:

The following information is provided in response to your request of December 2. I am able to provide data on the EEO investigators on a regional basis as requested, but our data on employees serving in the Federal Employee Appeals Authority is maintained on a composite basis.

As of December 8, 1975, the Federal Employee Appeals Authority had a nationwide professional staff of 103 persons to adjudicate appeals and hold hearings for Federal agencies on discrimination complaints. By sex, 92 (89.3 percent) were men and 11 (10.7 percent) were women. By minority-nonminority designations, 92 were non-minority and 11 were minority, with the following subdivisions by minority category: 9 Black, 1 American Indian, and 1 Oriental-American.

Appendix D

We have a total of 517 investigators in our 10 regions and Washington; of whom 184 have been trained to investigate EEO complaints, and of whom 52 are minority and women employees (28 White women, 1 Black woman, 8 Black men, 11 Spanish-surnamed men, and 4 Oriental-American men). Within the body of 184 investigators who are trained to investigate EEO complaints, 12 are minority and women (4 White women, 2 Black men, 3 Spanish-surnamed men, and 3 Oriental-American men). By regions and the Washington investigations office, the numbers of minority and women investigators trained to conduct EEO investigations are as follows: Atlanta, none; Boston, none; Chicago, none; Dallas, 1; Denver, none; New York, 2; Philadelphia, 1; Seattle, none; San Francisco, 4; St. Louis, 1; and Washington, 3.

Sincerely yours,

/s/ Joseph E. Oglesby
Joseph E. Oglesby
Director, Media Services
Office of Public Affairs

The Merit System—
A Good Investment In Good Government

Appendix E

November 26, 1975

Hon. Robert Bork
Solicitor General
Department of Justice
Washington, D.C.

Re: *Brown* v. *General Services Administration*

Dear Mr. Bork:

The government's brief includes a number of statements concerning the administrative process for complaints of employment discrimination and statistics regarding the actual operation of that system. Because of the manner in which this case arose, there is nothing in the record with regard to these statements and statistics. We would be most grateful if you could provide the following information to clarify the portions of the brief referred to so that we may respond in appropriate manner. Unless otherwise stated our request is for information for the most recent fiscal year available.

1. The government's brief, at p. 49, states that 35 to 45 percent of "informal complaints" are followed by "some sort of corrective action." Please state the total number of such complaints, and the number of instances in which each of the following types of corrective action is taken, i.e., (1) back pay awarded, (2) retroactive promotion, (3) immediate promotion, (4) promotion preference, (5) reinstatement, (6) reassignment, (7) reduction of adverse action, (8) rescission of adverse action, (9) improvements in personnel practices (explain), (10) improvement in equal

Appendix E

employment opportunity practices (explain), (11) training for complainant, (12) training for person charged with discrimination, (13) disciplinary action against person charged with discrimination, (14) upgrade complainant's performance rating, (15) other (specify).

2. The government's brief states that the term "retroactive relief" in the Civil Rights Commission report includes only back pay, not retroactive promotions. P. 49, n. 28. Please state the number of cases in which retroactive promotions were granted (a) at the informal counseling stage, prior to the filing of a formal complaint, (b) through counseling after the filing of a formal complaint, (c) as part of final agency action, (d) by the Commission (e) by the Appeals Review Board.

3. The government's brief, at p. 49, n. 28, states that the 22 cases of back pay excludes awards of back pay (a) at the informal counseling stage and (b) by the Commission on appeal. Please state the number of cases in which back pay was awarded (1) at the informal counseling stage prior to the filing of a formal complaint, (2) through counseling after the filing of a formal complaint, (3) by the Appeals Review Board on appeal, (4) by the Commission on appeal. State the number of persons to whom back pay was awarded at each stage, if different from the number of cases.

4. The government's brief, p. 49, n. 28, states that of the 985 cases of corrective action, 4% involved awards of back pay, 6% retroactive promotions, and 10% "prospective promotions." Are the actual numbers 39, 58, and 157 respectively? What is the total number of cases in which both back pay and retroactive promotion was awarded?

Appendix E

5. The government's brief, p. 49, n. 28, refers to a form of corrective action called "prospective promotion." Does this mean (a) an immediate promotion, (b) guaranteed promotion into the next vacancy, (c) priority consideration for promotion into the next vacancy, or (d) consideration for promotion into the next vacancy. To the extent "prospective promotion" includes (b), (c), or (d), please state the number actually promoted within one year of the award of "prospective promotion."

6. We would like to examine the agency decisions in the cases referred to in n. 28, p. 49, of the government's brief, in which either back pay or retroactive promotion was awarded. Please advise us where and how this can be done.

7. The government's brief, p. 50, n. 30 states that there was a finding of discrimination in 7 percent of all final dispositions. Since the total number of such dispositions was 2650, was the total number of findings of discrimination 185? Among the cases in which discrimination was found, in how many cases did the corrective action ordered include (1) back pay, (2) retroactive promotion, (3) immediate promotion, (4) promotion preference, (5) reinstatement, (6) reassignment, (7) reduction of adverse action, (8) rescission of adverse action, (9) improvements in personnel practices (explain), (10) improvements in equal employment opportunity practices (explain), (11) training for complainant, (12) training for person charged with discrimination, (13) disciplinary action against person charged with discrimination, (14) upgrade complainants performance rating (15) other (specify).

8. The government's brief, pp. 11 and 38, states that the processing of a complaint must be prompt. Please state,

for the government as a whole and for each agency for which statistics are available (a) the number and percentage of complaints in, or at the end of, the latest fiscal year, which were over 180 days old and thus in violation of the 180 day rule provided by 5 C.F.R. §713.220(a), (b) the average age of complaints in, or at the end of, the latest fiscal year, (c) with regard to the last fiscal year in which the 60 day rule was in effect, the number and percentage of complaints over 60 days old, and the average age of all complaints in, or at the end of, that year.

9. The government's brief states that the complaints examiner may make recommendations regarding "the general environment out of which the complaint arose" p. 40, and that the regulations "authorize broad remedial action by the agency or the Commission." Please state (a) whether the examiner may recommend class-wide relief in a case under §§713.213-236, (b) whether he must do so in such a case under certain circumstances and if so what circumstances, (c) whether the agency, Appeals Review Board or Commission may order class-wide relief in a case under §§713.213-236, (d) whether they must do so in such a case under certain circumstances, and if so what circumstances, (e) the number of cases in which class-wide discrimination was found (i) under §§713.213-236 and (ii) under §713.251, (f) the number of cases in which class-wide retroactive promotion was ordered (i) under §§713.213-236 and (ii) under §713.251, and (g) the number of cases in which class-wide back pay was ordered (i) under §§713.213-236 and (ii) under §713.251.

10. The government's brief states that the complaints examiners must be "impartial" and "qualified". Pp. 11, 51.

Please state, for each of the Civil Service regions, the number of complaints examiners (a) who are white-male, white-female, black-male, black-female, and (b) who have experience in civil rights matters acquired (i) as employees of E.E.O.C., (ii) as employees of the Commission on Civil Rights, (iii) as employees of the Civil Rights Division of the Department of Justice, (iv) in private practice as counsel for civil rights litigants (v) other (specify).

11. The government's brief states that each complainant has the right to be represented by "a representative of his own choosing." P. 41. Please state (1) the number and percentage of complainants represented by counsel at the hearing, and (2) the number and percentage of cases in which the defendant agency or its officials were represented by counsel paid for by the government at the hearing.

12. The government's brief states that a recommended decision finding discrimination becomes binding within 30 days if not overturned within that time. P. 42. State the number of instances in which such a finding actually became binding for this reason.

13. The government's brief states that, following final decision by the Board, the Commission "may reopen and reconsider any decision." P. 40. State the number of occasions when the Commission actually did so.

14. The government's brief states that the Board may arrange for "additional investigation to be conducted by Commission personnel." P. 40. State the number of times that this has actually occurred and the type of investigation conducted.

Appendix E

15. The government's brief states that the regulations "*authorize* broad remedial action by the agency" on a finding of discrimination in a 5 C.F.R. §713 administrative proceeding. P. 41. Do these regulations limit the inherent authority of the agencies to remedy unlawful discrimination (i) to administrative proceedings under 5 C.F.R. §713, (ii) to the specific remedies and circumstances set out in 5 C.F.R. §713, or (iii) in any other way (specify).

16. The government's brief describes a number of deadlines which must be met by the complainant and the respondent agency. If the complainant fails to act within the deadline, under what circumstances can or must the relief sought be denied for that reason? On how many occasions has this occurred? If the agency fails to act within the deadline, under what circumstances can or must the relief sought be granted for that reason? On how many occasions has this occurred?

17. The government's brief states that the complaints examiner transmits his findings and recommendations to the agency head for a final decision. Pp. 39-40. Please state whether the complainant is provided with a copy of these recommendations and afforded an opportunity to comment thereon to the agency head before the latter makes his decision.

18. The government's brief states that the investigation may require the giving of sworn testimony. P. 38. Please state the number and percentage of investigations in which this took the form of (a) oral answers to oral questions in a sworn and transcribed proceeding, (b) execution of an affidavit prepared solely by the affiant, (c) execution of an

Appendix E

affidavit prepared by the investigator in consultation with the affiant, (d) other (explain). Please state the number and percentage of investigations in which the complainant or his representative was permitted to and did ask questions as part of this "sworn testimony."

19. The government states that the Board reviews "The complaint file and all relevant written representations made to it." P. 40; See also P. 51 n. 32. Please state (a) the total combined length of all complaint and similar files of all cases considered by the Board in the last complete year, and (b) the number and percentage of cases in which written representations were made to the Board by (i) the complainant and (ii) the agency or its officials.

20. With regard to the government's description of the informal counseling process and the resulting corrective action, we would like to examine the report filed by the E.E.O. counsellor with regard to the counseling provided to Mr. Brown in the fall of 1970 regarding his rejection for promotion. See Brief for Petitioner, p. 5.

21. The government's brief states, p. 42, that in the event of undue delay the Commission "may" take certain action under 5 C.F.R. §713.220(c). Please state the number of instances in which the Commission (a) required an agency to take special measures to insure prompt processing, and describe the measures required (b) assumed responsibility for processing the complaint, or (c) supplied an investigator and required an agency to reimburse the Commission.

22. The government's brief, p. 55, states that the version of 5 C.F.R. §713.220(a) in effect in 1971, provided that in the event of undue delay the Commission "may" take cer-

Appendix E

tain action. Please state, for the last full year in which this provision was in effect, the number of instances in which the Commission (a) required the agency to take special measures to insure prompt processing of the complaint and describe the measures, (b) accepted an appeal pursuant to §713.220(a) under §713.234.

23. The government's brief, at pp. 57 and 53a, states that, in the last three fiscal years the Board remanded a significant number of cases (111 in 1975) and reversed a number of others on technical grounds without reaching the merits (58 in 1975). We would like information as to the outcome of these sorts of cases in subsequent agency proceedings. Please state, for the cases heard in the most recent fiscal year as to which subsequent agency proceedings are now reasonably complete, (a) the number of cases in which discrimination was found, (b) the number of cases in which back pay was awarded, and (c) the number of cases in which retroactive promotions were awarded.

Yours sincerely,

/s/ ERIC SCHNAPPER
ERIC SCHNAPPER
Counsel for Petitioner

ES:aa

Appendix F

[SEAL]

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

February 13, 1976

Eric Schnapper, Esquire
10 Columbus Circle
New York, New York 10019

Re: Brown v. General Services Administration
(No. 74-768)

Dear Mr. Schnapper:

Your letter dated November 26, 1975, requests information concerning certain statements contained in our brief for the respondents in this case. The statements to which your letter refers include some that reflect statistical information furnished to us by the Civil Service Commission and some that describe the Commission's published regulations governing the administrative process for adjudicating equal employment opportunity complaints by federal employees. We address each of your questions below.

Question 1. The brief for the petitioner in this case, in arguing that a federal employee's resort to the Civil Service Commission's administrative complaint procedure is futile, made reference (pp. 52-53) to certain statistics contained in the report of the United States Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort —1974*, purportedly showing that only a few complainants are awarded retroactive relief in the administrative process. Our brief noted that the same report contained other statistics showing that "35 to 45 percent of the informal

complaints are followed by some form of corrective action, including promotion, reinstatement, reassignment, and reduction of rescission of adverse action" (Br. 49). As indicated in our brief, this information appears at page 67 and note 221 of the Civil Rights Commission's report. The total number of complaints on which the percentage are based is apparently set forth in the table on page 67 under the column headed "Number of Persons Counseled."

The Civil Service Commission has advised us that it does not have compiled data reflecting the number of instances in which the various types of corrective action referred to in your question were taken. Even a review of the hundreds of individual agency monthly reports on discrimination complaint processing would not permit an accurate answer to your inquiry, in part because the monthly reports are made in categories different from those that your letter uses (see FPM Letter No. 713-19, Attachment 2), and in part because it now appears that the various agencies have followed differing standards in computing and categorizing corrective actions.

Questions 2 through 6. Each of these questions relates to statistical information contained in footnote 28, pages 48-49, of our brief. We have endeavored to obtain for you the additional data that you request. The General Counsel of the Civil Service Commission has advised us, however, that the Commission's Office of Federal Equal Employment Opportunity does not have reliable data from which to answer your questions. Because the various reporting agencies have apparently been following differing standards in computing and categorizing corrective actions, the accuracy of the Commission's data cannot be assured. We have accordingly concluded that the entire footnote in our brief should be withdrawn. We enclose a

copy of a letter to the Clerk of the Supreme Court requesting that the Court be asked to disregard footnote 28.

Question 7. The statement in our brief to which your question relates merely refers to the data that appears in the Civil Rights Commission's report at page 79. The Civil Service Commission does not have compiled data reflecting the number of cases in which the various types of corrective action were taken.

Questions 8 through 22 (with the exception of 20). These questions relate not to any statistical information contained in our brief but rather to the Civil Service Commission's published regulations, which we summarized in our brief. Your inquiries either are in the nature of pretrial discovery requests or call for legal conclusions or interpretations. It would be inappropriate, in our view, for us to attempt to respond to them at the present stage of this litigation.

Question 20. You may arrange to examine the counselor's report by contacting Robert Rice, Assistant General Counsel for Claims and Litigation, General Services Administration, Room 4101, 18th and F Streets, N.W., Washington, D.C. 20405.

Question 23. The Civil Service Commission has advised us that it does not have data reflecting the subsequent administrative disposition of cases reversed or remanded by the Appeals Review Board.

Sincerely,

ROBERT H. BORK
by LYW
Robert H. Bork
Solicitor General

Encl.